CLERK SUPR

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 348

CITY OF LINCOLN, NEBRASKA, AND STANDARD ACCIDENT INSURANCE COMPANY, PETITIONERS,

vs.

L. A. RICKETTS, AS TRUSTEE IN BANKRUPTCY OF LINCOLN TRUST COMPANY, BANKRUPT

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 7, 1935.

CERTIORARI GRANTED OCTOBER 14, 1935.

	Original	Print
Stipulation of Facts	75	67
Testimony	78	70
Chris O. Schlytern	78	70
Exhibit 2, Form of Receipt of Lincoln Trust Company	82	74
Exhibit 3, Form of Agreement called "Eltelic Contract"	84	75
Stipulation of Facts	91	83
Approval of Statement of Evidence by Counsel	92	84
Approval of Statement of Evidence by District Judge	92	84
Additional Transcript on Cross-Appeal of L. A. Ricketts, Trustee	93	85
Caption	93	85
Praecipe for Additional Transcript	94	86
Appeal Papers on appeal allowed to L. A. Ricketts, Trustee, by United States District Court	95	87
Petition for Appeal	95	87
Assignment of Errors	96	88
Citation and Acknowledgment of Service	98	89
Clerk's Certificate to Transcript	99	90
Appeal papers on appeal allowed to City of Lincoln, et al., by United States Circuit Court of Appeals	100	91
Petition for Appeal	100	91
Assignment of Errors	104	94
Waiver of Notice of hearing of Petition for Appeal	107	97
Order allowing Appeal, etc	108	97
Citation and Service	109	98
Bond on Appeal	110	99
Appeal papers on appeal allowed by L. A. Ricketts, Trustee	111	102
Petition for Appeal	112	102
Assignment of Errors	114	105
Waiver of Notice of hearing of Petition for Appeal	115	106
Order allowing Appeal	116	107
Order that L. A. Ricketts, Trustee, be not required to give Cost Bond on Appeal	117	108
Citation and Service	118	109
Proceedings in U. S. Circuit Court of Appeals	111	111
Appearance of Counsel for Appellants in Cause No. 10213	111	111
Appearance of Counsel for Appellee in Cause No. 10213	111	111
Appearance of Counsel for Appellant in Cause No. 10218	112	111
Appearance of Counsel for Appellees in Cause No. 10218	112	112
Appearance of Counsel for Appellants in Cause No. 10219	113	112
Appearance of Counsel for Appellee in Cause No. 10219	113	112
Appearance of Counsel for Appellant in Cause No. 10220	114	113
Appearance of Counsel for Appellees in Cause No. 10220	114	113
Order of Submission in Causes Nos. 10213, 10218, 10219 and 10220	115	113
Opinion, U. S. Circuit Court of Appeals, in Causes Nos. 10213, 10218, 10219 and 10220	117	114
Decree, U. S. Circuit Court of Appeals, in Causes Nos. 10213, 10218, 10219 and 10220	128	124
Petition of Appellants for Rehearing in Causes Nos. 10213 and 10219	130	126
Order denying Petition for Rehearing in Causes Nos. 10213 and 10219	132	127
Motion to Stay Issuance of Mandate in Causes Nos. 10213, 10218, 10219 and 10220	133	127
Order Staying Issuance of Mandate in Causes Nos. 10213, 10218, 10219 and 10220	134	128
Clerk's Certificate to Transcript	135	129

Order allowing writ of certiorari 129

United States Circuit Court of Appeals

EIGHTH CIRCUIT.

No. 10,213

IN BANKRUPTCY.

CITY OF LINCOLN, NEBRASKA, ET AL., APPELLANTS,

vs.

L. A. RICKETTS, AS TRUSTEE IN BANKRUPTCY, ETC., APPELLEE.

No. 10,218

IN BANKRUPTCY.

L. A. RICKETTS, TRUSTEE IN BANKRUPTCY, ETC., APPELLANT,

vs.

CITY OF LINCOLN, NEBRASKA, ET AL., APPELLEES.

No. 10,219

IN BANKRUPTCY.

CITY OF LINCOLN, NEBRASKA, ET AL., APPELLANTS,

vs.

L. A. RICKETTS, AS TRUSTEE IN BANKRUPTCY, ETC., APPELLEE.

No. 10,220

IN BANKRUPTCY.

L. A. RICKETTS, TRUSTEE IN BANKRUPTCY, ETC., APPELLANT,

vs.

CITY OF LINCOLN, NEBRASKA, ET AL., APPELLEES.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

FILED JANUARY 10, 1935.

INDEX.

	Original	Print
Caption to Transcript from United States District Court	2	1
Praecipe for Transcript	3	2
Claim of City of Lincoln, Nebraska, file In the Matter of Lincoln Trust Company, Bankrupt	6	5
Order of Referee allowing Claim of City of Lincoln, etc	8	7
Application of City of Lincoln to amend Claim	9	8
Objection of L. A. Ricketts, Trustee, to application for leave to amend Claim	11	9
Order of Referee allowing City of Lincoln to file Amended Claim	12	10
Amended Claim of City of Lincoln	13	10
Objections and Answer of L. A. Ricketts, Trustee, to Amended Claim of City of Lincoln	16	14
Reply of City of Lincoln to Objections and Answer of L. A. Ricketts, Trustee	19	16
Motion of L. A. Ricketts, Trustee, to file Additional Objections to Claim of City of Lincoln	20	16
Objections of City of Lincoln to Motion of L. A. Ricketts, Trustee to file Additional Objections	21	18
Order sustaining Motion of L. A. Ricketts, Trustee, to set aside submission and to introduce further evidence	22	19
Stipulation of Facts	23	19
Order permitting Standard Accident Insurance Company to be made a party	25	21
Order of Referee disallowing Amended Claim of City of Lincoln claiming priority and preference, and directing that Order allowing Claim as a General Creditor entered August 16, 1932 be approved and confirmed	26	22
Petition of City of Lincoln for review of Order of Referee	33	28
Order of Referee denying portion of Petition for Review which refers to Order of February 21, 1934, etc	37	32
Certificate of Referee on Review	39	33
Request of City of Lincoln and Standard Accident Insurance Company for Findings of Fact and Conclusions of Law by the District Court	44	37
Opinion of District Court of October 8, 1934	46	39
Order of District Court for withdrawal of Opinion of October 8, 1934 and for substitution of new Opinion	48	40
Substituted Opinion of District Court	49	40
Findings of Fact and Conclusions of Law of the District Court	61	57
Decree, December 17, 1934	64	59
Appeal papers on appeal allowed to City of Lincoln, et al., by United States District Court	65	60
Notice of Appeal and Service	65	60
Petition for Appeal	66	61
Assignment of Errors	67	61
Waiver of Notice of Petition for Appeal, etc	70	63
Order allowing Appeal	71	64
Citation and Acceptance of Service	72	64
Bond on Appeal	73	65
Stipulation as to appeals and as to Transcript of Record in connection therewith	74	66
Statement of Evidence	75	67
Caption	75	67

Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the March Term, 1935, of said Court, before the Honorable Archibald K. Gardner, the Honorable Joseph W. Woodrough and the Honorable Arba S. Van Valkenburgh, Circuit Judges.

Attest: E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

(Seal)

Be it Remembered that heretofore, to-wit: on the tenth day of January, A. D. 1935, a transcript of record pursuant to an appeal from the District Court of the United States for the District of Nebraska allowed by the United States Circuit Court of Appeals for the Eighth Circuit, and an appeal allowed by the District Court of the United States for the District of Nebraska, in certain causes wherein the City of Lincoln, Nebraska, et al., were Appellants and L. A. Ricketts, as Trustee in Bankruptcy of Lincoln Trust Company, Bankrupt, was Appellee, and pursuant to an appeal from the District Court of the United States for the District of Nebraska, allowed by the United States Circuit Court of Appeals for the Eighth Circuit, and an appeal allowed by the District Court of the United States for the District of Nebraska, in certain causes wherein L. A. Ricketts, as Trustee in Bankruptcy of Lincoln Trust Company Bankrupt, was Appellant, and the City of Lincoln, Nebraska, et al., were Appellees, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, which said transcript as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, is in the words and figures following, to-wit:

1 United States District Court for the District of Nebraska, Lincoln Division.

In the Matter of

Lincoln Trust Company, Bankrupt.

No. 2314. In Bankruptcy.

Re: Claim of City of Lincoln and Standard Accident Insurance Company.

Transcripts of Record on Appeal and Cross Appeal.

2 In the District Court of the United States for the District of Nebraska, Lincoln Division.

In the Matter of

Lincoln Trust Company, Bankrupt.

No. 2314. In Bankruptcy.

In Re: Claim of City of Lincoln and Standard Accident Insurance Company.

Pleas before Honorable J. A. Donohoe, Judge of the District Court of the United States, in and for the District of Nebraska, within the Eighth Judicial Circuit, at the October 1934 Term of said Lincoln Division, begun on the 4th day of October, 1934, and held, for the Court's convenience, at the United States Court House in the City of Omaha within the Omaha Division of the District of Nebraska.

Appearances.

For Appellant: Stewart, Stewart and Whitworth, 1412 Sharp Building, Lincoln, Nebraska.

For Appellee: R. A. Boehmer, 126 South 11th Street, Lincoln Nebraska.

Be It Remembered, That at a District Court of the United States for the District of Nebraska, Lincoln Division, held

at the United States Court House in the City of Omaha, in the Omaha Division, for the convenience of the Court, at the October 1934 Term, there being present and presiding Honorable J. A. Donohoe, United States District Judge in and for the District of Nebraska, proceedings were had and done in the respective days hereinafter mentioned in the matter of Claim of the City of Lincoln against L. A. Ricketts as Trustee of the Lincoln Trust Company, Bankrupt, that is to say:

3 Praecipe for Transcript.

Filed at 3:—P. M. Dec. 31, 1934.

To R. C. Hoyt, Clerk of Said Court:

Waiving the printing of the record under the provisions of an act of Congress entitled "An Act to Diminish the Expense of Proceedings on Appeal and Writ of Error or Certiorari" approved February 13, 1911, electing to take and file transcript of the record in the United States Circuit Court of Appeals, 8th Circuit, and to be printed under the supervision of the clerk in accordance with the rules of said court of appeals, you are hereby directed to prepare a transcript on appeal of City of Lincoln, Nebraska and Standard Accident Insurance Company, as appellants, for entry in the Circuit Court of Appeals, 8th Circuit, and to incorporate therein the portions of the record herein designated.

Claim of the City of Lincoln, Nebraska filed as a general claim. (Omit all exhibits attached to claim.)

Order allowing claim as that of a general creditor. (Show only allowance of City of Lincoln's claim and total amount of other claims allowed without listing other claims separately.)

Application of the City of Lincoln to amend claim to claim priority and to set aside allowance.

Objection of Trustee.

Order allowing City of Lincoln to file amended proof.

Amended claim of the City of Lincoln.

Objections of trustee to amended claim.

Reply of claimant to objections.

Motion of trustee to withdraw submission of issues and to offer additional evidence.

Objection of City of Lincoln to the application of the trustee to withdraw submission of issues.

4 Order sustaining trustee's motion to offer further evidence.

Stipulation of additional facts and evidence and agreement between the City of Lincoln, Standard Accident Insurance Company, assignee, and trustee on motion to withdraw submission of issues.

Order permitting Standard Accident Insurance Company to be made a party as assignee of the claim of the City of Lincoln.

Order denying claim of the City of Lincoln as a priority claim and directing former order of August 16, 1932 allowing claim as a general claim, allowed to stand.

Petition of City of Lincoln and Standard Accident Insurance Company to review order denying priority and order permitting trustee to offer additional evidence, offered by way of stipulation.

Order denying petition of review as to so much thereof as related to order permitting trustee to offer additional evidence.

Certificate of Referee on petition for review of order denying the claim of the City of Lincoln the right to priority.

Certificate of Referee on petition of City of Lincoln and Standard Accident Insurance Company for review of order denying part of the petition for review.

Request of City of Lincoln and Standard Accident Insurance Company for findings of fact and conclusions of law.

Memorandum of District Judge Donohoe allowing priority in the amount of $12,979.42 of amended claim of City of Lincoln. Filed October 8, 1934.

Order withdrawing memorandum opinion dated October 8, 1934. Filed December 12, 1934.

Memorandum of District Judge Donohoe. Filed December 12, 1934.

Findings of fact and conclusions of law. Filed December 17, 1934.

Judgment and decree. Filed December 17, 1934.

Notice of appeal with admission of service thereon.

Petition for appeal.

Assignment of errors.

Waiver of notice of hearing on petition for appeal.

Order allowing appeal.

Citation on appeal with admission of service thereon.

Bond on appeal.

Petition for appeal to Circuit Court of Appeals, 8th Circuit.

Assignment of errors filed in Circuit Court of Appeals, 8th Circuit.

Waiver of notice of hearing on petition for appeal to Circuit Court of Appeals, 8th Circuit.

5 Order of Circuit Court of Appeals, 8th Circuit, allowing appeal.

Stipulation relating to use of transcript of record for both appeals and cross-appeal.

Statement of evidence with approval thereof.

This praecipe and admission of service thereon.

Signed this 29th day of December, 1934.

DON W. STEWART,
A. A. WHITWORTH,
C. B. PAINE,
Attorneys for Appellants.

I hereby acknowledge receipt of copy of the foregoing praecipe and accept service of the same this 31st day of December, 1934, and propose no additions thereto.

L. A. RICKETTS, as Trustee in Bankruptcy of LINCOLN TRUST COMPANY, Bankrupt,
By R. A. Boehmer, His Attorney of Record.

6 Claim of the City of Lincoln, Nebraska, Filed As A General Claim, Omitting Exhibits Attached Thereto.

555-Proof of Debt Due Corporation.

In the District Court of the United States for the District of Nebraska, Lincoln Division.

In the Matter of

Lincoln Trust Company, a corporation, Bankrupt.

No. 2314. In Bankruptcy.

At Lincoln, in said district of Nebraska, on the 15th day of August, A. D. 1932, came E. M. Bair of Lincoln, in the County of Lancaster, and State of Nebraska and made oath, and says that he is treasurer of the City of Lincoln, Nebraska, a Municipal Corporation incorporated by and under the laws of the State of Nebraska, and carrying on business at Lincoln, in the County of Lancaster, and State of Nebraska and that he is duly authorized to make this proof, and says that the said Lincoln Trust Company, the person by whom this petition for adjudication of bankruptcy has been filed was at and before the filing of the said petition, and still is justly and truly indebted to said corporation in the sum of Forty-Five Thousand Five Hundred Nine and no/100 Dollars; that the consideration of said debt is as follows:

On September 26, 1928, E. M. Bair, as City Treasurer of the City of Lincoln Nebraska, a municipal corporation, placed in the custody of said Lincoln Trust Company, the sum of Forty-five Thousand and no/100 ($45,000.00) Dollars, funds of the City of Lincoln, Nebraska, evidenced by check marked Exhibit "A", attached hereto and made a part of this claim; that said money was to be payable to the said E. M. Bair as City Treasurer on demand, with interest at three per cent per annum, payable quarterly, and said interest was paid thereon to March 26, 1932. To evidence said transaction said Lincoln Trust Company executed and delivered to said City Treasurer nine certificates in the sum of Five Thousand ($5000.00) Dollars each, payable on demand, which certificate marked Exhibits "B" to "J" inclusive, are likewise attached hereto and made a part of this claim; that on the 14th day of June, 1932, said certificates were presented for payment to said Lincoln Trust Company and payment was refused; that on the 15th day of June, 1932, written demand was made on said Lincoln Trust Company for payment of said certificates and payment was again refused. That there is

due and owing from said bankrupt to claimant on account thereof the following sums:

Principal	$45,000.00
Interest thereon at three per cent per annum from March 26, 1932, to June 15, 1932	302.45
Interest thereon at the legal rate of seven per cent from June 15, 1932, to July 9, 1932, the date of filing the petition and of adjudication	206.55

and interest at seven per cent per annum thereon thereafter.

That no part of said debt has been paid (except none); that there are no set-offs or counter claims to the same (except None); and that said corporation has not, nor has any person by its order, or to the knowledge or belief of said deponent, for its use, had or received any manner of security for said debt whatever.

E. M. BAIR,
Treasurer of said Municipal Corporation.

7 Subscribed and sworn to before me this 15th day of August, A. D. 1932.

(Notarial Seal)

HELEN M. STEIN,
Notary Public.

My commission expires September 15, 1933.

Letter of Attorney to Max Kier and Lloyd E. Chapman, Attorneys-at-Law. Either of you are hereby authorized by said creditor to appear for and represent said creditor and vote for said creditor in any proceedings, or meetings, which may be had or called in the above entitled proceedings in court, before the referee in bankruptcy or elsewhere and particularly to vote for said creditor in the choice of a trustee of said bankrupt whenever such election is held or in your discretion oppose confirmation of any composition offered by or in behalf of said bankrupt, and to receive [and receive] and receipt for any and all moneys which may be or may become payable to said creditor therein or for or on account of said debt. That said creditor is a corporation, and that the officer executing this power of attorney is duly authorized so to do and to attach the corporate seal on behalf of said creditor.

In witness whereof said creditor has hereunto signed his name and caused his seal to be affixed when signing the deposition proceedings, the 15th day of August, 1932.

CITY OF LINCOLN, NEBRASKA,
a municipal corporation,
By F. C. Zehrung, Mayor, (Seal)
Creditor.

Attest:
Theo H. Berg,
City Clerk.

State of Nebraska,
Lancaster County—ss.

On this 15th day of August, A. D. 1932, before me, the undersigned Helen M. Stein, a Notary Public duly commissioned and qualified for and residing in said county, personally came F. C. Zehrung, who being by me first duly sworn did say that he is Mayor of the municipal corporation above named, and duly authorized to execute the foregoing power of attorney on its behalf, and F. C. Zehrung, to me known to be the identical person whose name is affixed to the foregoing instrument and acknowledged that he executed the said power of attorney for and on behalf of said corporation and that same was his voluntary act and deed, and the voluntary act and deed of said corporation.

Witness my hand and Notarial Seal the day and year last above written.

(Notarial Seal) HELEN M. STEIN,
Notary Public.

My commission expires the 15th day of September, 1933.

Filed at 10:30 A. M. August 16, 1932 in Referee's Office. Filed in Clerk's Office included in Transcript of Pleadings and Proceedings in Petition for Review, June 12, 1934.

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8 Referee's Order Allowing Claims, (Showing Only Allowance of City of Lincoln's Claim and Total Amount of Other Claims Without Listing Separately.)

At Lincoln, in said District this 16th day of August, 1932, in a Court of Bankruptcy, before Daniel H. McClenahan, Referee in Bankruptcy.

This being the day set for a first meeting of the Creditors of the above named bankrupt, of which due notice has been

given by mail and by publication, as required by law, and the claims hereinafter set forth having been filed, and it appearing to the Court that the proof thereof is sufficient, and there being no objections thereto,

It Is Ordered, that said claims be allowed in the amounts hereinafter set forth:

Name	Address	Attorney	Amount
* * *	* * * *	* * * *	* * * * *
City of Lincoln by E. M. Bair	City Hall, Lincoln, Nebr.	Max Kier & Lloyd E. Chapman, City Hall, Lincoln, Nebr.	$45,509.00
* * *	* * * *	* * * *	* * * * *
Total amount of other claims listed			$40,506.58

DANIEL H. McCLENAHAN,
Referee in Bankruptcy.

Filed in Referee's Office August 16, 1932, Filed in Clerk's Office included in Transcript of Pleadings and Proceedings in Petition for Review, June 12, 1934.

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9 (Application of City of Lincoln to Amend Claim.)

To the Honorable Daniel H. McClenahan, Referee in Bankruptcy:

Comes now City of Lincoln, a municipal corporation, and shows to the court that it filed a claim against the above named bankrupt on August 16, 1932, in the sum of $45,509.00 and that said claim was allowed as a general claim in said amount on August 16, 1932; that through inadvertence said claim did not specifically state that it was entitled to priority and through lack of knowledge claimant did not state fully the facts on which claim to priority was based; that since the filing and allowance of said claim, claimant has discovered additional facts and that in equity and justice it should be permitted to amend its claim by setting forth said facts and specifically claiming its right to priority.

Wherefore claimant moves the court to set aside the allowance heretofore made of its claim as a general claim and to give claimant leave to amend its aforesaid claim by adding thereto just preceding the signature of E. M. Bair the paragraph attached hereto marked Exhibit A and made a part hereof.

CITY OF LINCOLN, a municipal corporation,
By Lloyd E. Chapman,
City Attorney.

10 State of Nebraska,
County of Lancaster—ss.

Lloyd E. Chapman, being first duly sworn, on oath deposes and says that he is the duly qualified and acting City Attorney for the City of Lincoln, Nebraska; that he is acquainted with the matters and facts set forth in the foregoing application and the same are true as he verily believes.

LLOYD E. CHAPMAN.

Subscribed in my presence and sworn to before me this 30th day of August, 1932.

(Notarial Seal) HELEN M. STEIN,
Notary Public.

August 27, 1932.

Received copy of the above application this 27th day of August, 1932, and consent that same may be taken up for hearing on August ..... at ..... o'clock.

L. A. RICKETTS, Trustee,
By R. A. Boehmer,
His Attorney.

Filed in Referee's Office at 11:00 A. M. on August 30, 1932. Filed in Clerk's Office as part of Transcript of Pleadings and Proceedings on Petition for Review at 1:50 P. M. June 12, 1934.

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11 (Objection of L. A. Ricketts, Trustee, to Application for Leave to Amend Claim.)

To the Honorable Daniel H. McClenahan, Referee in Bankruptcy:

Comes now L. A. Ricketts, Trustee and objects to the allowance of the application of the City of Lincoln for leave to amend its claim for the reason that said claim was heretofore filed, approved and allowed as a general claim against said estate, and no just cause is shown to set aside the allowance thereof, and to permit an amendment thereof.

Wherefore, your Trustee prays that said application be dismissed and disallowed.

L. A. RICKETTS, Trustee,
By R. A. Boehmer,
His Attorney.

Filed in Referee's Office at 4:30 P. M. on August 31, 1932. Filed in Clerk's Office as part of Transcript of Pleadings and Proceedings on Petition for Review at 1:50 P. M. June 12, 1934.

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12 Referee's Order Allowing City of Lincoln to File an Amended Claim.

At Lincoln, in said district, this 28th day of September, 1932, in a Court of Bankruptcy, before Daniel H. McClenahan, Referee in Bankruptcy.

The above cause coming on for hearing at a meeting of creditors, of which due notice was given more than ten days prior hereto, upon the application of the City of Lincoln, to file an amended claim, and the answer of the trustee filed thereto, and there appearing on behalf of the City of Lincoln, S. M. Kier and Don W. Stewart, on behalf of the trustee, R. A. Boehmer, attorney and the matter having been heard and submitted for determination, it is,

Ordered, that the City of Lincoln, be, and they hereby are permitted to file an amended proof of claim.

DANIEL H. McCLENAHAN,
Referee in Bankruptcy.

Filed in Referee's Office at 5:00 P. M. September 28, 1932. Filed in Clerk's Office, included in Transcript of Pleadings and Proceedings in Petition for Review at 1:50 P. M., June 12, 1934.

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13 (Amended Claim of City of Lincoln.)

In the District Court of the United States, District of Nebraska, Lincoln Division.

In the Matter of

Lincoln Trust Company, a corporation, Bankrupt.

No. 2314. In Bankruptcy.

Proof of Debt Due Corporation.

Amended Claim.

At Lincoln, in said district of Nebraska, on the 18th day of November, A. D., 1932, came E. M. Bair of Lincoln, in the County of Lancaster, and State of Nebraska, and made oath, and says that he is treasurer of the City of Lincoln, Nebraska, a municipal corporation incorporated by and under the laws of the State of Nebraska, and carrying on business at

Lincoln, in the County of Lancaster, and State of Nebraska, and that he is duly authorized to make this proof, and says that the said Lincoln Trust Company, the person by whom this petition for adjudication of bankruptcy has been filed was at and before the filing of the said petition, and still is justly and truly indebted to said corporation in the sum of Forty-five Thousand Five Hundred Nine and no/100 Dollars; that the consideration of said debt is as follows:

On September 26, 1928, E. M. Bair as City Treasurer of the City of Lincoln, Nebraska, a municipal corporation, placed in the custody of said Lincoln Trust Company, the sum of Forty-five Thousand and no/100 ($45,000.00) Dollars, funds of the City of Lincoln, Nebraska, evidenced by check marked Exhibit "A", attached hereto and made a part of this claim; that said money was to be payable to the said E. M. Bair as City Treasurer on demand, with interest at three per cent per annum, payable quarterly, and said interest was paid thereon to March 26, 1932. To evidence said transaction said Lincoln Trust Company executed and delivered to said City Treasurer nine certificates in the sum of Five Thousand ($5000.00) Dollars each, payable on demand, which certificates marked Exhibits "B" to "J" inclusive, are likewise attached hereto and made a part of this claim; that on the 14th day of June, 1932, said certificates were presented for payment to said Lincoln Trust Company and payment was refused; that on the 15th day of June, 1932, written demand was made on said Lincoln Trust Company for payment of said certificates and payment was again refused. That there is due and owing from said bankrupt to claimant on account thereof, the following sums:

Principal	$45,000.00
Interest thereon at three per cent per annum from March 26, 1932, to June 15, 1932.....	302.45
Interest thereon at the legal rate of seven per cent from June 15, 1932, to July 9, 1932, the date of filing the petition and of adjudication	206.55

and interest at seven per cent per annum thereon thereafter.

That no part of said debt has been paid; that there are no set-offs or counter claims to the same; and that said corporation has not, nor has any person by its order, or to the knowledge or belief of said deponent, for its use, had or received any manner of security for said debt whatever.

That said money paid by claimant to the bankrupt as aforesaid constituted a trust fund to be held by the bankrupt for

claimant and should have been segregated and kept separate from all other funds in the bankrupt's possession, but
14 in violation of its duty as trustee the bankrupt wrongfully commingled said money with the bankrupt's own funds and by such commingling the entire money, funds, securities, and assets of the bankrupt were impressed with a trust in favor of claimant in the amount of this claim; that the money, funds, securities and assets of the bankrupt which came into the possession of this court on July 9, 1932, and the possession of the receiver and thereafter the trustee in bankruptcy including the cash on hands and funds on deposit in the name of Lincoln Trust Company and in the name of Lincoln Trust Company Trust Department, both in The First National Bank of Lincoln, Nebraska, together with the securities held in the trust department of the bankrupt known as "segregated assets" included the aforesaid money of claimant or the proceeds thereof and all of such cash, funds, deposits, securities, and assets and specifically those referred to above are impressed with a trust in favor of the claimant and claimant is entitled to payment of the amount due as aforesaid from said cash, funds, deposits, securities and assets and the proceeds thereof before any payments are made therefrom to other persons, corporations, whether as creditors or otherwise, and the trustee should be ordered to immediately pay claimant in full from such cash, deposits, funds which came into the possession of this court as aforesaid and if the amount thereof is insufficient then said securities and assets referred to above should be sold and the proceeds applied in payment thereof and any balance remaining should be paid from the remaining securities or assets of the bankrupt.

E. M. BAIR,
Treasurer of said Municipal Corporation.

Subscribed and sworn to before me this 18 day of November, 1932.

HELEN M. STEIN,
(Seal) Notary Public.

My commission expires September 15, 1933.

Letter Of Attorney to Max Kier and Lloyd E. Chapman, Attorneys-at-Law. Either of you are hereby authorized by said creditor to appear for and represent said creditor and vote for said creditor in any proceedings, or meetings, which may be had or called in the above entitled proceedings, in court, before the referee in bankruptcy or elsewhere and particularly to vote for said creditor in the choice of a trustee of

said bankrupt whenever such election is held, or in your discretion oppose confirmation of any composition offered by or in behalf of said bankrupt, and to receive and receipt for any and all moneys which may be or may become payable to said creditor therein or for or on account of said debt. That said creditor is a corporation, and that the officer executing this power of attorney is duly authorized so to do and to attach the corporate seal on behalf of said creditor.

15 In witness whereof said creditor has hereunto signed his name and caused his seal to be affixed when signing the deposition proceeding, the 18 day of November, 1932.

(Seal) CITY OF LINCOLN, NEBRASKA,
a municipal corporation,
By F. C. Zehrung, (Signed)
Mayor,
Creditor.

Attest:
Theo. H. Berg, (Signed)
City Clerk.

State of Nebraska,
Lancaster County—ss.

On this 18 day of November, A. D., 1932, before me, the undersigned, Helen M. Stein, a Notary Public duly commissioned and qualified for and residing in said county, personally came F. C. Zehrung, who being by me first duly sworn did say that he is Mayor of the municipal corporation above named, and duly authorized to execute the foregoing power of attorney on its behalf, and F. C. Zehrung to me known to be the identical person whose name is affixed to the foregoing instrument and acknowledged that he executed the said power of attorney for and on behalf of said corporation and that same was his voluntary act and deed, and the voluntary act and deed of said corporation.

Witness my hand and Notarial Seal the day and year last above written.

(Seal) HELEN M. STEIN, (Signed)
Notary Public.

My commission expires the 15th day of September, 1933.

Filed in Referee's Office at 4:25 P. M., Nov. 21, 1932. Filed in Clerk's Office as part of Transcript of Pleadings and Proceedings in Petition for Review at 1:50 P. M. June 12, 1934.

16 (Objections and Answer of L. A. Ricketts, Trustee, to Amended Claim of City of Lincoln.)

Comes now L. A. Ricketts, the duly appointed, qualified and acting Trustee in Bankruptcy for Lincoln Trust Company, Bankrupt, and for his objection and answer to the purported claim of E. M. Bair, as City Treasurer of the City of Lincoln, Nebraska, filed herein on or about the 18th day of November, 1932, alleges as follows:

1. He denies each and every allegation contained in said purported claim, and not hereinafter specifically admitted or affirmatively alleged.

2. He further alleges that said E. M. Bair, as City Treasurer of said City of Lincoln, Nebraska, did, on or about the ..... day of ...., 1932, file a general claim in this matter for the same indebtedness, as is set forth in the present purported claim, and that said general claim of said E. M. Bair was heretofore and on or about the 16th day of August, 1932, allowed as a general claim against the estate of said Lincoln Trust Company, and that said allowance is now in full force and effect and constitutes final determination of the rights of said E. M. Bair and said City of Lincoln, Nebraska, against the estate of said Lincoln Trust Company, Bankrupt.

3. That said E. M. Bair, as City Treasurer of the City of Lincoln, Nebraska, did, on or about the 26th day of September, 1928, pay to said Lincoln Trust Company the sum of $45,000.00, being funds of the City of Lincoln, Nebraska, and that said Lincoln Trust Company at said time executed and delivered to the said City Treasurer nine (9) instruments in writing, as are attached to the original claim of said E. M. Bair, and said City of Lincoln.

4. That the principal sum of money so paid to the said Lincoln Trust Company by said city of Lincoln, has not been repaid to said City of Lincoln, but that interest thereon was paid to the claimant at the rate of three (3) per cent per annum up to the 26th day of March, 1932.

17 5. That the money so paid by claimant to said Lincoln Trust Company was deposited in the general bank account of said Lincoln Trust Company, in which account were also deposited monies from a large number of other persons who paid money to said Lincoln Trust Company for the purchase of bonds or other securities, which accounts were entitled "Modern Investments", and that there were a total number of 233 persons depositing money under said Modern

Investments, and in the total amount of $28,133.78, at the date of adjudication in bankruptcy, and that there were also deposited in said general account of said Lincoln Trust Company monies paid in by other persons, under so-called "Eltelic" contracts, wherein said Lincoln Trust Company was to use the money paid in for the payment of insurance premiums as set forth in contracts given to said depositors and that the number of persons having deposited money with said Lincoln Trust Company under so-called Eltelic contracts was 138, and in the total amount of $15,443.67 at the date of adjudication in bankruptcy, and that a large number of other persons also deposited large sums of money with the Lincoln Trust Company for various purposes, that were also placed in the general account of said Lincoln Trust Company, and deposited in its general bank account in which the money of said claimant also was deposited.

6. That the money so paid by claimant to said Lincoln Trust Company was never segregated or kept from other funds in the general account, and general bank deposit of said Lincoln Trust Company.

7. Further answering, said claim, your Trustee alleges that said Lincoln Trust Company, prior to its adjudication, maintained and operated a so-called Trust Department, which department handled and managed estates of deceased and incompetent persons, and in said department had a large number of securities segregated and belonging to said estates and that said department also carried a bank account separate and distinct from the general account of the Lincoln Trust Company, in which account monies received on behalf of said Trust estates were deposited and that the money deposited by the claimant was never in said Trust Department, and was never deposited in the bank account of said Trust Department, and never at any time constituted any of the assets so held by said Trust Department.

18 8. That the monies and securities held in said Trust Department of said Lincoln Trust Company were and are deposited and held for the specific purpose of paying and securing the Trust estates, handled, controlled and managed by said Trust Department and are not subject to a lien or payment of the general claims allowed against the Lincoln Trust Company, Bankrupt.

Wherefore, your Trustee prays that the claim of said E. M. Bair, City Treasurer of the City of Lincoln, and of the said City of Lincoln, be disallowed and dismissed and that the order of the court entered on August 16, 1932, allowing the

original claim of said City of Lincoln be permitted to stand and for such other and further relief as may be just and proper.

R. A. BOEHMER,
Attorney for Trustee.

State of Nebraska,
Lancaster County—ss.

L. A. Ricketts, being first duly sworn on oath deposes and says that he is the above named Trustee in Bankruptcy; that he has read the foregoing objection and answer, knows the contents thereof, and that the facts and matters therein contained are true, as he verily believes.

L. A. RICKETT.

Subscribed in my presence and sworn to before me this 5" day of December, 1932.

(Seal) ELENOR ELDER,
Notary Public.

Filed in Referee's Office at 4:00 P. M. Dec. 5, 1932. Filed in Clerk's Office as part of Transcript of Pleadings and Proceedings in Petition for Review at 1:50 P. M. June 12, 1934.

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19 (Reply of City of Lincoln to Objections and Answer of L. A. Ricketts, Trustee.)

Comes now City of Lincoln, Nebraska, and for reply to the objection and answer of the trustee of the bankrupt to its claim, denies specifically each and every allegation therein contained, except such as admit allegations and statements contained in claimant's amended claim and denies that there has been a final determination of claimant's rights against the bankrupt.

CITY OF LINCOLN, NEBRASKA,
By Max Kier, Lloyd E. Chapman,
Its Attorneys.

Filed in Referee's Office at 11:45 A. M. Dec. 7, 1932. Filed in Clerk's Office as part of Transcript of Pleadings and Proceedings in Petition for Review at 1:50 P. M. June 12, 1934.

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20 (Motion of L. A. Ricketts, Trustee, to File Additional Objections to Claim of City of Lincoln.)

Comes now L. A. Ricketts, the duly appointed, qualified and acting Trustee in Bankruptcy of said bankrupt, and represents to the court as follows:

That heretofore the claimant, being the City of Lincoln, Lancaster County, Nebraska, being a municipality governed by a home ruled charter, filed its proof of claim herein in the principal amount of forty-five thousand dollars ($45,000), which claim was thereafter allowed at the first meeting of the creditors of said bankrupt, as a general claim; that thereafter said claimant filed an amended proof of claim alleging that it had a priority for the amount of said claim over and above other creditors, and that thereafter your Trustee filed objections to said amended claim, and a hearing was had thereon and the matter was duly submitted to the Referee, but that said matter has not as yet been decided by said court.

Your Trustee further sets forth as a fact and shows the court that subsequent to the submission of said matter the said City of Lincoln, claimant, has made settlement for the amount due to it from said bankrupt, and has been paid the amount due to it from said bankrupt by The Standard Accident Insurance Company of Detroit, Michigan, or some other insurance or bonding company, which company insured said claimant against any loss by reason of the deposit made by said claimant with the bankrupt, by reason whereof said claimant has elected to receive said payment from said Insurance Company in payment of its claim against said bankrupt, and is now estopped to assert any further claim against said bankrupt, and the said claim should therefore be disallowed.

Herefore, your Trustee prays that he be permitted to withdraw the submission of said matter, and that said submission be set aside, and that he be permitted to file an amended or supplemental objection to the said claim of the City of Lincoln and to offer evidence in support thereof, and for such other orders as may be proper in the matter.

R. A. BOEHMER,
Attorney for Trustee.

Received copy of the foregoing motion on this 6th day of February, 1934.

STEWART, STEWART & WHITWORTH,
Attorneys for Claimant.

Filed in Referee's Office at 5:30 P. M., Feb. 6, 1934. Filed in Clerk's Office as part of Transcript of Proceedings and Pleadings in Petition for Review at 1:50 P. M. June 12, 1934.

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21 (Objections of City of Lincoln to Motion of L. A. Ricketts, Trustee, to File Additional Objections.)

Comes now City of Lincoln, Nebraska, and hereby objects to the motion of the Trustee of the above named bankrupt for leave to withdraw a submission and to file additional objections to the claim of City of Lincoln and to adduce further evidence in support of said objections for the following reasons:

1. Said motion is insufficient in form or substance to entitle it to consideration.

2. The facts purported to be set forth in said motion are insufficient to justify the granting thereof.

3. Said motion fails to state any valid legal ground for the granting of said motion.

4. A hearing on said claim and the Trustee's objections thereto was duly held before the Referee on December 6, 1932, and the claim and the objections thereto were submitted to said Referee for his determination by brief filed by Trustee with said Referee on January 3, 1933.

5. At the time of the aforesaid submission of said claim and objections thereto the Referee by said Trustee as aforesaid, said Trustee had full knowledge of the alleged facts set forth in the aforesaid motion but took no action with reference thereto until the filing of the aforesaid motion on February 6, 1934 and by reason thereof said Trustee has been guilty of laches and is estopped from requesting leave to file additional objections and evidence in support thereof and withdrawing its submission.

Wherefore, claimant prays that said motion be denied.

CITY OF LINCOLN, NEBRASKA,
By Stewart, Stewart & Whitworth,
Its Attorneys.

State of Nebraska,
Lancaster County—ss.

Don W. Stewart, being first duly sworn upon his oath, deposes and says that he is one of the attorneys for the above entitled claimant, which is a municipal corporation, that he is acquainted with the matters and facts set forth in the foregoing objections and the same are true.

DON W. STEWART.

Subscribed in my presence and sworn to before me this 16 day of February, 1934.

(Notarial Seal) CHARLES B. PAINE,
Notary Public.

Filed in Referee's Office at 10:40 A. M. Feb. 17, 1934. Filed in Clerk's Office as part of Transcript of pleadings and proceedings in Petition for Review at 1:50 P. M. June 12, 1934.

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22 Order Sustaining Trustee's Motion to Set Aside Submission and to Introduce Further Evidence.

At Lincoln, in said District, this 21st day of February, 1934, in a Court of Bankruptcy, before Daniel H. McClenahan, Referee in Bankruptcy.

The above cause coming on for hearing upon the motion of the Trustee filed February 6, 1934, for an order setting aside the submission of the issues raised by the claim of the City of Lincoln, Nebraska, and the objections filed thereto, and the objections filed by the City of Lincoln to said motion, and the same having been submitted to the Court, the Court finds, that the motion of the Trustee should be granted, and it is therefore Ordered, that the submission of the matter heretofore made be, and the same is hereby set aside and the objections of the claimant to said motion overruled, and the parties are authorized to submit such further evidence as they desire.

DANIEL H. McCLENAHAN,
Referee in Bankruptcy.

Filed in Referee's Office at 5:00 P. M., Feb. 21, 1934. Filed in Clerk's Office as part of Transcript of Pleadings and Proceedings in Petition for Review at 1:50 P. M. June 12, 1934.

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23 (Stipulation of Facts.)

It is hereby stipulated and agreed by and between L. A. Ricketts, Trustee in Bankruptcy of Lincoln Trust Company, City of Lincoln, Nebraska, and Standard Accident Insurance Company, that the following is a correct statement of facts and the truth of such facts is hereby admitted by the parties hereto and shall be accepted as true in connection with the amended claim of City of Lincoln, Nebraska, and its motion to reconsider and set aside the allowance of said claim as a general claim and to allow such claim as a prior claim.

1. On September 26, 1928, Lincoln Trust Company as principal and said Insurance Company as surety executed and delivered to said City a bond wherein it was agreed the sum of Forty-five Thousand and no/100 ($45,000.00) Dollars then paid by said City to said Trust Company should be repaid to said City upon its demand. On or about June 15, 1932, said City demanded the repayment of said sum from said Trust Company, which said Trust Company failed to repay. Said City of Lincoln is a municipal corporation of the State of Nebraska, governed under a home rule charter.

2. On December 12, 1932, said City and said Insurance Company entered into an agreement whereby said Insurance Company agreed to pay and did pay said City the sum of $45,276.81 in satisfaction of its liability on the aforesaid bond and said City in consideration thereof agreed to assign to said Insurance Company the certificates in the amount of $45,000.00 delivered by said Trust Company to said City when the aforesaid payment was made by said City to said Trust Company and said City further agreed to and did assign to said Insurance Company all its rights arising out of the payment of said $45,000.00 to it by said Trust Company, including its claim and amended claim against said Trust Company, a bankrupt, in the sum of $45,000.00 with interest. L. A. Ricketts, Trustee in Bankruptcy of said Trust Company had knowledge of the foregoing settlement on December 12, 1932.

3. In the event only that the foregoing facts are received in evidence by the Referee, it is further stipulated and agreed that by reason of the facts heretofore set forth in this stipulation, said insurance Company is the assignee of the claim and amended claim of said City of Lincoln against the above named bankrupt in the sum of $45,000.00 and said City of Lincoln assigned all of its rights against said bankrupt to said Insurance Company, and said Insurance Company should be made a party to the proceedings relating to the allowance of said amended claim, and the parties hereto hereby consent that an order be entered by the Referee designating said Insurance Company as assignee of said claim and amended claim and making it a party to the foregoing proceedings.

4. It is further stipulated and agreed that all of the parties hereto reserve the right to object to any of the matters of fact herein stipulated on the ground of immateriality thereof.

24 The foregoing stipulation signed this 20 day of February, 1934.

L. A. RICKETTS,
Trustee in Bankruptcy of Lincoln Trust Company,
By R. A. Boehmer, His Attorney.

CITY OF LINCOLN, NEBRASKA,
By Max Kier, Lloyd E. Chapman,
Its Attorneys.

STANDARD ACCIDENT INSURANCE COMPANY,
Don W. Stewart,
By Stewart, Stewart & Whitworth,
Its Attorneys.

Filed in Referee's Office at 5:00 P. M. Feb. 21, 1934; Filed in Clerk's Office as part of Transcript of Pleadings and Proceedings in Petition for Review, at 1:50 P. M. June 12, 1934.

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25 Order Permitting the Standard Accident Insurance Company to be Made a Party to Said Matter.

At Lincoln, in said District, this 21st day of February, 1934, in a Court of Bankruptcy, before Daniel H. McClenahan, Referee in Bankruptcy.

An order having been made sustaining the motion of the Trustee to set aside the submission of the claim of the City of Lincoln filed as a secured claim, and the objections filed thereto by the Trustee and permitting the introduction of further evidence, and the Trustee of the above named bankrupt having filed a stipulation signed by L. A. Ricketts, Trustee of the above named bankrupt, by his attorney, and by the City of Lincoln, by its attorney, and by the Standard Accident Insurance Company, by its attorneys, permitting an order to be made making the Standard Accident Insurance Company party to said proceedings in the matter of said claim, it appearing from such stipulation that the said Standard Accident Insurance Company paid to the City of Lincoln the sum of $45,276.81 in satisfaction of its liability on a bond given to said city and has become the assignee of said claim, and that said insurance company is now a proper party to said proceeding, it is

Ordered, that the Standard Accident Insurance Company, as assignee of said claim and amended claim be, and it

hereby is made a party to the foregoing proceeding in accordance with said stipulation filed.

DANIEL H. McCLENAHAN,
Referee in Bankruptcy.

Filed in Referee's Office at 5:00 P. M. Feb. 21, 1934. Filed in Clerk's Office as part of Transcript of Pleadings and Proceedings in Petition for Review at 1:50 P. M. June 12, 1934.

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26 (Order of Referee Disallowing Amended Claim of City of Lincoln Claiming Priority and Preference, and Directing that Order Allowing Claim as a General Creditor Entered August 16, 1932, be Approved and Confirmed.)

In the District Court of the United States for the District of Nebraska, Lincoln Division.

In the Matter of

Lincoln Trust Company, Bankrupt.

Case No. 2314.

At Lincoln, in said District, this 13th day of April, 1934, in a Court of Bankruptcy, before Daniel H. McClenahan, Referee in Bankruptcy.

The above cause came on for hearing on the filing of an amended claim filed by the City of Lincoln on November 21, 1932, claiming as a priority creditor entitled to payment in full, after having first filed its claim as a general creditor on August 16, 1932, and having the same allowed as such in the amount of Forty-five Thousand Five Hundred Nine ($45,509.00) Dollars, same having been allowed on the same day of filing. The claim was later paid by The Standard Accident Insurance Company who insured the city against loss and by order made February 21, 1934, on stipulation between the parties, said insurance company as assignee of said claim was made a party as claimant in this proceeding. Said amended claim seeks priority payment alleging that the money in the sum of Forty-five Thousand ($45,000.00) Dollars paid over to the bankrupt constituted a trust fund to be held for the benefit of claimant, and was to be segregated and kept separate from other funds and that the bankrupt company failed so to do but wrongfully commingled the money with its own funds into a general fund and used the same for its own benefits and that thereby all of the assets of the bankrupt company coming into the hands of the Trustee should be impressed with a trust

in favor of the claimant and the same sold and claimant's claim paid in full before general creditors are paid. The Trustee objected to said claim on the ground that the city, having duly filed its claim as a general creditor, and had the same allowed such, and having filed no petition for review from the order allowing, and such order was in full force and effect and was a determination and an adjudication of the claim, and disposed of all of the rights of claimant; alleged that the trust certificates were issued to claimant as attached to claimant's general claim and that the bankrupt company paid the claimant interest on the money at the rate
27 of 3% per annum until March 26, 1932. Alleged that the money so received from the claimant was deposited in the general bank account in the general funds of the bankrupt company and that in the same fund there were a large number of other monies received from many persons, and that the monies were mingled with the general funds of the company and that in said account was also deposited, at the date of the adjudication in bankruptcy, money received from 233 persons who had deposited money in what was known as the Modern Investment Account in the sum of $28,133.78, and that a large number of other persons to the extent of the sum of $15,443.67, 138 in number, had deposited money for the payment of premiums on their life insurance under what was known as "Eltelic" accounts, all of which were deposited in the general bank account of the bankrupt company mingled with the general funds of said company, and that none of the monies received from claimant were ever carried in a trust account or segregated or carried by the bankrupt company as trust funds. The objections of the Trustee further allege, that the bankrupt operated what was known as a Trust Department which was used for the purpose of handling, managing, and controlling of estates of deceased persons and incompetent persons from which estates monies and a large number of securities were received and which were kept separate and segregated from the general funds and accounts of the company, and that the monies of claimant were not carried in such department and constituted no part of the funds in said department, and that such monies and securities in the trust department were held solely for the purpose of paying such trust estates and were not subject to lien or payment of claims of general creditors, and that the claimant's claim was that of a general creditor only.

There appeared for the claimant, Don Stewart and Max Kier, attorneys, and for the Trustee, R. A. Boehmer, attorney and the evidence was taken, and thereafter briefs were

filed and the cause submitted to the Court for determination.

28 The evidence shows that a voluntary petition for the adjudication of the Lincoln Trust Company, a bankrupt, was filed July 9, 1932, and an adjudication was had on the same day. It is admitted by stipulation, and the evidence shows, that the funds of the claimant were never, from the time of their receipt, about September 26, 1928, deposited, kept, segregated, or carried on the books of the company as a trust account, nor were they included in any of the assets or monies carried in what was known as the Trust Department, but were placed in the general funds of the Lincoln Trust Company and in the general bank account of said company and were mingled with the general funds of the bankrupt company and of many others, and were carried on the general records of the company as trust certificates outstanding. There is no evidence in the record that traces the funds of the claimant into the hands of the trustee, and in order to claim funds or property in the hands of the trustee in bankruptcy such funds must be traced directly into money or property coming into the hands of the Trustee, Re: Horigan Supply Company (C. C. A. 8th) 2 Fed. (2d.) 791; 5 A. B. R. (N. S.) 508. And the rule as to tracing trust funds into the hands of a Trustee is governed by the decisions of the Federal Courts and not State Courts; Mandel vs. Berton (C. C. A. 8th) 292 Fed. 127.

The evidence shows that the general bank account in which the money of the City of Lincoln was deposited was depleted from time to time and on July 8, 1932, the day before adjudication, it contained but $628.63, and that lowest amount prior to June 15, 1932, when the City of Lincoln demanded payment from the Lincoln Trust Company, was $7,875.97 on May 13, 1932. The evidence shows that the general fund was replenished from time to time from funds collected from investors and from money left in the Modern Investment Account and from parties paying in money to pay the premiums on their life insurance and from many other persons. Where a bank account in which funds obtained by fraud or are to be held in trust, are deposited, is exhausted before a claimant attempts to rescind or recover, the fact that it is replenished by money taken from other victims, gives such claimant no preference in the fund on theory of either a trust or
29 lien. Cunningham vs. Brown 265 U. S. 1; 3 A. B. R. (N. S.) 1. The instruments under which the money was turned over by the City of Lincoln to the Lincoln Trust Company, the bankrupt, were nine in number in the sum of $5,-

000.00 each and are dated September 26, 1928, and recite as follows:

"No. Lincoln, Nebraska, Sept. 26, 1928 No.....

This Is To Certify that the Lincoln Trust Company of Lincoln, Nebraska, holds for investment in Trust funds belonging to City Treasurer of Lincoln, Nebraska, in the sum of Five Thousand & no/100 Dollars ($5,000.00) with interest at 3 per cent per annum payable quarterly from date until returnable to owner on demand 19.....

This Trust Certificate bears no per cent interest after maturity.

LINCOLN TRUST COMPANY,
By (S.) Howard Hadley, Secretary."

It will be noticed that the instrument is a negotiable one, payable on demand, and draws interest, and recites that the money is taken for investment and appears to be in the nature of a loan. It is contended by the claimant that the securities deposited with the Department of Trade and Commerce of the State of Nebraska in pursuance to Section 8-209 of the compiled Statutes of Nebraska for the year 1929, as shown by the stipulation offered in evidence, is liable for the claim of claimant, that this question is disposed of adverse to claimant. The statute says that this fund shall only be liable for obligations of the company as guardian, curator, executor, administrator, assignee, receiver, trustee, either by appointment of Court or under will, and for deposits of money in Court, and cannot be applied or used for any other debts or obligations until the aforesaid are paid. A deposit upon which interest is paid cannot be Special or in trust, but must be on the same footing with other unsecured demands. McNulta vs. West, Chicago Park 99 Fed. 900 (C. C. A.) In the case of State vs. Bartley 39 Neb. 353, 58 N. W. 172, and quoted in Re: State Treasurer's Settlement, (Neb.) 70 N. W. 532-538 it is held that a deposit of public moneys on which interest is paid is a loan or investment of the funds.

Claimant further contends that it is entitled to priority payment under Section 64b Paragraph 7 of the Bankruptcy Act granting priority to debts which, under the laws of the state or the United States, are given priority, not by any specific statutes, but under the common law that a debt due a sovereign is entitled to priority payment, the State of Nebraska by Section 49-101 of the compiled Statutes of Nebraska for the year 1929 having adopted so much of the common law that was not inconsistent with the constitution of the United States, the organic law of the state

or any law passed, or to be passed, by the legislature of the state.

The right of priority given the state by common law, where that right has been preserved to the state, is not affected by taking over debtor's property by a Trustee in Bankruptcy and such right can be asserted under Section 64b (7) of the Bankruptcy Act. State of Oregon vs. Ingram (9th C. C. A.) 63 Fed. (2d) 417; 22 A. B. R. (N. S.) 720. This then brings us to the question, does the state's prorogative pass to the City of Lincoln in this state? The Supreme Court of Nebraska has said that the power of the Courts to declare the established doctrines of the common law not inapplicable to the state, should be used sparingly. Meng vs. Coffee, 67th Neb. 50. This Court has further laid down the rule that it is the well established law of the state that in matters of strictly municipal concern, cities that have adopted the home rule charter under article two of the constitution, such as the City of Lincoln, are not subject to state legislation. Carlberg vs. Metcalf, 120 Neb. 481, 234 N. W. 87. That the sovereign right of the state does not pass to the political subdivisions, many Courts have so held. The case of Aetna Casualty & Guaranty Company vs. Bramwell, 12 Fed. (2nd) 307, held that this right was one of purely local law as construed by the highest court of the state, and that it was a right conferred only upon a state and did not apply to county or a political subdivision of the state which deposited funds in a bank, to entitle such county or political subdivisions to priority in absence of a statute conferring such right. In this case the Court also refers to the case of Denver vs. Stenger, (C. C. A. 8th) 295 Fed. 809, wherein it
31 was held that the right passed to the City of Denver under the Colorado law and says that this case does not now apply as the common law prerogative was later denied by the Supreme Court of the State of Colorado, citing United States Fidelity & Guaranty Company vs. McFerson, 241 Pacific 728. See also note 52 A. L. R. 756, 757. The case of Denver vs. Stenger, supra, seems to stand alone in holding that the right passes to political subdivisions of the State, and that court seems to infer in the opinion that the power had been expressly delegated to the city. The court says "A city is an agency of the state exercising the delegated sovereignty thereof in local matters". In the note to 51 A. L. R. 1339, the author says it is the general rule that the prerogative right does not extend to the political subdivisions merely because the right is given to the state. The only Nebraska case on the subject is the case of State ex rel

Spellman, Atty. General vs. S. S. Hadley Co., Bankers, School District of Boone County, intervener, being an opinion by Wilson, Commissioner, and unreported, in the Supreme Court #27751, filed June 16, 1931. The Court says:

"No authorities are cited from this state to sustain the contention that Nebraska possess the crown's common law prerogative to have its debts paid in preference to the debts of other creditors. In Freeholders of Middlesex Co. vs. State Bank, 29 N. J. Eq. 268, 271, in answer to the contention that the crown's prerogative was a part of the common law of New Jersey, it is stated and held: "It certainly has never received judicial approval, and, so far as my knowledge extends, no law officer of the state has ever attempted to enforce it. For over one hundred years as an actual, practical prerogative of government, it has neither been exerted nor recognized, and this circumstance, as a matter of contemporaneous and long-continued construction by all departments of the government, would seem to negative the existence of the right with a great emphasis." This doctrine has never been asserted, to our knowledge, in the sixty odd years of judicial history in Nebraska. "A prerogative which has remained so long practically useless can hardly be said to exist." Freeholders of Middlesex Co. vs. State Bank, supra."

There is no statute in the State of Nebraska conferring the right upon cities. The matter of the deposits by the City of Lincoln with the Lincoln Trust Company was strictly one of municipal concern in which no state right was involved and hence no prerogative right was vested in the city either by statute or the State's common law right. As to the Trustee's objection that the adjudication of the claim as a
32 general creditor, which order is in full force and effect, fully determines the city's claim and bars them from filing the amended claim, this contention should be disposed of against the Trustee, as it appears from Paragraph 6 of General Order 21 of the United States Supreme Court that power is given the Referee to reexamine the claims and reconsider a ruling.

The Court therefore finds, that the equities are in favor of the Trustee, and that the claim of the City of Lincoln is that of a general creditor only, and that the original order allowing it as a general claim should stand.

It is therefore ordered, that the amended claim filed claiming priority and preference be, and the same hereby is disallowed, denied, and expunged from the records in said

cause, and the order allowing the claim as a claim of a general creditor in the sum of $45,509.00 made August 16, 1932, is approved and confirmed and directed to stand as entered.

DANIEL H. McCLENAHAN,
Referee in Bankruptcy.

Filed in Referee's Office at 4:00 P. M. April 13, 1934. Filed in Clerk's Office as Part of Transcript of Pleadings and Proceedings in Petition for Review at 1:50 P. M. June 12, 1934.

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33 (Petition of City of Lincoln for Review of Order of Referee.)

To the Honorable Daniel H. McClenahan, Referee in Bankruptcy:

Comes now City of Lincoln, Nebraska, a municipal corporation, and the Standard Accident Insurance Company, a corporation, and show to the court:

1. On or about August 16, 1932, City of Lincoln, Nebraska filed a claim against the above named bankrupt in the amount of $45,509.00.

2. On or about September 28, 1932, leave was given by the above named Referee to said City to amend its claim by claiming priority of payment and on November 21, 1932 said City filed an amended claim in the sum of $45,509.00, which it claimed was entitled to priority for the reasons stated therein. On December ...., 1932, the Trustee of the above named bankrupt filed objections to the allowance of said amended claim and on December 10, 1932, a hearing was held before said Referee on said amended claim and the objections thereto. Said City submitted its brief asking for allowance of said amended claim on December ...., 1932, and said Trustee submitted his brief in support of his objections on January 3, 1933.

3. On February 6, 1934, said Trustee made an application to file additional objections to the aforesaid claim and to introduce further evidence in support thereof. On February, 1934, said City filed objections to the aforesaid application of Trustee and on February 21, 1934, an order was entered by said Referee granting the aforesaid application of the Trustee. Thereafter, on February 21, 1934 further evidence was offered by said Trustee in the form of a stipulation of facts and it appearing therefrom that Standard Accident Insurance Company was liable as a surety to said City for the aforesaid claim and paid said City the amount

thereof on December 12, 1932, the said insurance com-
34 pany was thereupon made a party to said proceedings as assignee of said claim and amended claim.

4. On April 13, 1934, an order was entered by said Referee denying the right of said City and said Insurance Company to a priority in the payment of its claim and ordering that such claim should stand as a general claim against said bankrupt.

5. Said City and said Insurance Company complain of said order of April 13, 1934, as follows:

(a) The finding in the first paragraph on page 3 of said order that the funds of said City were never carried on the books of the bankrupt as a trust account is erroneous for the reason that the evidence shows that such funds were carried on the books of the bankrupt as a trust account.

(b) The finding in the first paragraph on page 3 of said order that there is no evidence that traces the funds of the claimant into the hands of the Trustee is erroneous for the reason that the evidence shows the lowest balance of cash items and cash on deposit including the funds in the "segregated assets account" up to bankruptcy was $12,979.42 on May 13, 1932 and it is the presumption that the funds passing to the trustee included such trust funds.

(c) The finding in the first paragraph on page 3 of said order that the rule as to tracing trust funds is governed by the decisions of the Federal Courts is erroneous for the reason that the bankruptcy act contains the specific provision that if the law of the state gives a priority then such priority shall be given by the bankruptcy court and the law of the State of Nebraska as construed by its courts gives claimant a priority under the facts existing.

(d) The finding in the second paragraph on page 3 of said order that the general bank account of bankrupt contained but $628.63 the day before adjudication, is erroneous for the reason the evidence shows that a separate account known as "Segregated assets account" was taken from the general bank account on June 15, 1932 in the amount of $44,982.46 of which $25,097.09 was on hand at the time of the adjudication of bankruptcy and which was a part of the general cash of the bankrupt.

(e) The finding in the second paragraph of page 4 of said order that the trust certificates issued by the bankrupt to said City were negotiable and in the nature of a loan is er-

roneous for the reason said certificates contain no words of negotiability nor indicating that the transaction was a loan but clearly show an agreement to hold the funds in trust.

(f) The finding in the second paragraph of paragraph 4 of said order that the securities held by the Department of Trade and Commerce of the State of Nebraska are not liable for payment of this claim is erroneous.

(g) The finding in the second paragraph on page 4 of said order that said trust certificates were in the nature of a loan is erroneous for the reason that even if a trust is not created by agreement of the parties, then the acceptance of funds as a mere deposit by the bankrupt, a trust company, was unauthorized and unlawful and a trust ex maleficio was thereupon created by law.

35 (h) The finding in the second paragraph of page 4 of said order that a deposit upon which interest is paid cannot be special or in trust, is erroneous for the reason that the rule stated applies only to deposits upon which interest must be paid under the law which was not true of the transaction involved herein.

(g) The finding in the last paragraph on page 6 of said order that the money paid by claimant to bankrupt was strictly one of municipal concern in which no state right was involved and no prerogative right was vested in the City either by statute or the state's common law right is erroneous for the reason the protection of a city's revenue and funds under the circumstances as shown by the evidence is one of state concern and City had a sovereign right to a priority in the protection of said funds.

(h) The finding in the next to the last paragraph of page 7 of said order that the equities are in favor of the Trustee and that the claim of the City is that of a general creditor only and that the original order allowing it as a general claim should stand, is erroneous for the reason the evidence shows that the equities are in favor of the City and that it is entitled to a priority and that the right of priority should be allowed said claimant.

(i) The finding in the last paragraph of page 7 of said order that the amended claim of claimant should be disallowed, is denied and expunged from the record is erroneous for the reason the said claim is entitled to be allowed as a prior claim.

(j) The conclusions of law contained in said order are erroneous.

(k) Said order is erroneous in not finding and determining that said amended claim should be allowed as a prior claim.

6. Said City and said Insurance Company complain of said orders of February 21, 1934, granting the application of the Trustee to file additional objections and introduce further evidence in support thereof and receiving further evidence as follows:

(a) Said application was insufficient in form or substance to entitle it to consideration.

(b) The facts purported to be set forth in said application were insufficient to justify the granting thereof.

(c) Said application failed to state any valid legal ground for the granting of said application.

(d) Said Trustee had full knowledge of the alleged facts set forth in his application before he submitted his objections to said Referee on January 3, 1933 but took no action until the filing of his application on February 6, 1934 and by reason thereof said Trustee was guilty of laches and was estopped from requesting leave to file additional objections and evidence in support thereof and from withdrawing its submission of its objections.

Wherefore City of Lincoln, Nebraska, and Standard Accident Insurance Company, feeling aggrieved because of the aforesaid orders of February 6, 1934 and April 13, 1934 pray that the same may be reviewed as provided by the
36 Bankruptcy Act and General Order 27 and that said Referee certify to the Judge of said court the questions presented in these proceedings together with the evidence and that it be decreed by said court that said orders were erroneous and that said amended claim should be ordered allowed as a prior claim against the above named bankrupt.

CITY OF LINCOLN, NEBRASKA,
A Corporation, and
STANDARD ACCIDENT INSURANCE COMPANY, a Corporation,
Don W. Stewart,
By Stewart, Stewart & Whitworth,
Their Attorneys.

State of Nebraska,
Lancaster County—ss.

Don W. Stewart, being first duly sworn upon his oath deposes and says that he is one of the attorneys for the above named claimants, which are corporations, that he is acquainted with the matters and facts set forth in the foregoing petition for review and the same are true.

DON W. STEWART.

Subscribed in my presence and sworn to before me this 2nd day of May, 1934.

(Notarial Seal) CHARLES B. PAINE,
Notary Public.

Filed in Referee's Office at 1:20 P. M. May 2, 1934. Filed in Clerk's Office, included in Transcript of Pleadings and Proceedings in Petition for Review, at 1:50 P. M. June 12, 1934.

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37 (Order of Referee Denying Portion of Petition for Review which Refers to Order of February 21, 1934, etc.)

In the District Court of the United States for the District of Nebraska, Lincoln Division.

In the Matter of

Lincoln Trust Company, Bankrupt.

Case No. 2314.

At Lincoln in said District this 11th day of June, 1934, in a Court of Bankruptcy, before Daniel H. McClenahan, Referee in Bankruptcy.

The above matter came on for hearing on the petition for review filed by the City of Lincoln, Nebraska, and the Standard Accident Insurance Company, a Corporation, Assignee of said claim, filed May 2, 1934, and so much of said petition for review as is set forth in Paragraph 6 thereof purporting to be a review of an order made February 21, 1934, the prayer of said review however reciting an order of "February 6th", the Court Finds should be denied for the reason that said order was made upon a stipulation and agreement filed by and between the parties above named and the trustee, and the rules of this Court provide that a petition for review of an order of the Referee should be filed within twenty days after the order to be reviewed is made and therefore the complaint as to this order is out of time and should be denied.

Where a petition for review of an order of the Referee is not filed until after the time has expired as provided by the rules of the Court, the petition should be denied: Re Trottier 14 A. B. R. (N. S.) 192; 32 F. (2nd) 1010. That this rule is binding and must be adhered to is well settled. United States of America vs. Hines, Trustee (8th Cir.) 3 A. B. R. (N. S.) 132; 298 F. 853.

It is therefore Ordered, that so much of the petition for review as refers to the order made February 21, 1934 be
38 and the same hereby is disallowed and denied.

DANIEL N. McCLENAHAN,
Referee in Bankruptcy.

Filed in Referee's Office at 3:30 P. M. June 11, 1934. Filed in Clerk's Office as part of Transcript of Pleadings and Proceedings in Petition for Review at 1:50 P. M. June 12, 1934.

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39 (Certificate of Referee on Review.)

To The Honorable Judges of the United States District Court:

I, Daniel H. McClenahan, Referee in Bankruptcy, in charge of the above proceeding do hereby certify:

That in the course of said proceeding an order was made on April 13, 1934, denying the right of the City of Lincoln, Nebraska and the Standard Accident Insurance Company, Assignee, thereof, to a priority over general creditors of said bankrupt estate and directing that the order made on said claim under date of August 16, 1932 allowing said claim as a claim of a general creditor in the sum of $45,509.00 on such claim originally filed as a claim of a general creditor be allowed to stand. The claim was originally filed by the City of Lincoln under authority duly authorized by the City Council of the City of Lincoln, Nebraska as a general claim, and at a meeting of creditors duly held on August 16, 1932 an order was made allowing the claim as such and no review was taken from this order. On August 30, 1932 the City of Lincoln by and through its attorney filed a motion for an order to set aside the allowance of such claim as a general claim and asked leave to file an amended claim claiming priority over other creditors, to which the trustee objected, and after hearing an order was made on September 28, 1932 permitting the amended claim to be filed but not setting aside the original order allowing the claim as that of a general creditor, and on

November 21, 1932, the claimant, City of Lincoln, filed an amended claim claiming that the City should be entitled to priority over other creditors as the claim was for trust
40 funds which should have been segregated and kept separate from other funds of the bankrupt.

The evidence was taken, the matter briefed, and submitted for determination. The claim was paid by the Standard Accident Insurance Company who had insured the City of Lincoln against loss and the trustee on learning of this fact on February 6, 1934 filed an application to reopen the case and show this fact. On February 21, 1934 a stipulation and agreement was filed between the parties stipulating among other things that the Standard Accident Insurance Company had paid the City of Lincoln the sum of $45,276.81 in satisfaction of the claim and that the City of Lincoln had assigned their claim to the said Standard Accident Insurance Company, and on the strength of this stipulation and agreement of additional facts an order was made February 21, 1934 allowing the trustee to offer the additional evidence as stipulated and permitting the Standard Accident Insurance Company to be made a party to said matter as the assignee of said claim. On May 2, 1934 the City of Lincoln, Nebraska and the Standard Accident Insurance Company feeling themselves aggrieved by the order of April 13, 1934 and the order of February 21, 1934 filed a petition to review said orders setting up their errors in relation to both orders, the prayer of said petition for review however reciting that it is a review of an order of February 6, 1934. No petition for review of the order of February 21, 1934 was filed within the twenty days from the date of said order as provided by the rules of this Court and an order was entered denying so much of the petition for review as refers to that order.

That the errors complained of in connection with the order of April 13, 1934 are thirteen in number, being letters from A to K inclusive and are set forth in the petition for review.

That a summary of the evidence on which the said order of April 13, 1934 is based is as follows: That a portion of the evidence is stipulated as set forth in Exhibit 1 in the records.

The evidence shows that a voluntary petition for the adjudication of the Lincoln Trust Company, a bankrupt, was filed July 9, 1932, and an adjudication was had on the
41 same day. It is admitted by stipulation, Paragraph 3 of Exhibit 1, and the evidence shows, that the funds of the claimant were never, from the time of their receipt, about September 26, 1928 deposited, kept, segregated, or carried on the books of the company as a trust account, nor were

they included in any of the assets or monies carried in what was known as the Trust Department, but were placed in the general funds of the Lincoln Trust Company and in the general bank account of said company and were mingled with the general funds of the bankrupt company and of many others, and were carried on the general records of the company as trust certificates outstanding. The evidence in the record traces no funds of the claimant into the hands of the trustee.

The evidence shows that the general bank account in which the money of the City of Lincoln was deposited was depleted from time to time and on July 8, 1932, the day before adjudication, it contained but $628.63, and that the lowest amount prior to June 15, 1932, when the City of Lincoln demanded payment from the Lincoln Trust Company, was $7,875.97 on May 13, 1932. The evidence shows that the general fund was replenished from time to time from funds collected from investors and from money left in the Modern Investment Account and from parties paying in money to pay the premiums on their life insurance and from many other persons.

The instruments under which the money was turned over by the City of Lincoln to the Lincoln Trust Company, the bankrupt, were nine in number in the sum of $5,000.00 each and are dated September 26, 1928, and recite as follows:

"No. Lincoln, Nebraska, Sept. 26, 1928 No. .....

This Is To Certify that the Lincoln Trust Company of Lincoln, Nebraska, holds for investment in Trust funds belonging to City Treasurer of Lincoln, Nebraska, in the sum of Five Thousand & no/100 Dollars ($5,000.00) with interest at 3 per cent per annum payable quarterly from date until returnable to owner on demand 19.....

This Trust Certificate bears no per cent interest after maturity.

LINCOLN TRUST COMPANY,
By (S) Howard Hadley,
Secretary."

The questions presented for review are:

1. Was the deposit in nature of a trust fund and if so is there evidence tracing the funds into the hands of the trustee, at the date of Bankruptcy, July 9, 1932?

2. Does the rule of the Federal Court as to tracing
42 trust funds into the hands of the trustee prevail or rule as interpreted by the Supreme Court of the State of Nebraska as contended by claimant prevail?

3. Does the City of Lincoln, Claimant, possess the Common Law prerogative, to have its debts paid first in preference to the other creditors by reason of being a political subdivision of the State, and therefore have priority under Paragraph 7 of Section 64-B of the Bankruptcy Act, and does their right pass to a surety who insures the City against loss?

4. Does the City of Lincoln come under the provisions of Section 8-209 of the Compiled Statutes of Nebraska for the year 1929, relating to the deposit of securities, to protect funds in the possession of Trust companies as guardians, administrators, executors, and trustees by appointment of Court or under will?

I hand up for the information of the Judges of this Court the following papers:

1. Claim of the City of Lincoln, Nebraska filed as a general creditor.

2. Order allowing claim as that of a general creditor which includes a large number of other claims.

3. Application of the City of Lincoln to amend claim to claim priority and to set aside allowance.

4. Objection of Trustee.

5. Order allowing City of Lincoln to file amended proof.

6. Amended claim of the City of Lincoln.

7. Objections of trustee to amended claim.

8. Reply of claimant to objections.

9. Motion of trustee to withdraw submission of issues and to offer additional evidence.

10. Objection of City of Lincoln to the application of the trustee to withdraw submission of issues.

11. Stipulation of additional facts and evidence and agreement between the City of Lincoln, Standard Accident Insurance Company, assignee, and trustee on motion to withdraw submission of issues.

12. Order sustaining trustee's motion to offer further evidence.

13. Order permitting Standard Accident Insurance Company to be made party as assignee of the claim of the City of Lincoln and amended claim.

14. Order denying claim of the City of Lincoln as a priority claim and directing former order of August 16, 1932, allowing claim as a general claim, allowed to stand.

15. Petition of City of Lincoln and Standard Accident Insurance Company to review order denying priority and order permitting trustee to offer additional evidence, offered by way of stipulation.

16. Order denying petition of review as to so much thereof as relates to order permitting trustee to offer additional evidence.

43 17. Brief of claimant City. Brief of Trustee. Reply Brief of City.

18. Transcript of evidence.

Dated June 12, 1934.

Respectfully submitted,

DANIEL McCLENAHAN,
Referee in Bankruptcy.

Filed in Referee's Office at 11:30 A. M. June 12, 1934.
Filed in Clerk's Office at 1:50 P. M. June 12, 1934.

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44 (Request of City of Lincoln and Standard Accident Insurance Company for Findings of Fact and Conclusions of Law by the District Court.)

Filed September 7, 1934.

To the Honorable Judge of the District Court of the United States, in and for the Lincoln Division of the District of Nebraska:

Come now the City of Lincoln, Nebraska, and the Standard Accident Insurance Company and request the court to make the following special findings of fact and conclusions of law:

Findings of Fact.

1. On September 29, 1928, the City of Lincoln, in the State of Nebraska, a municipal corporation, paid to the Lincoln Trust Company $45,000.00 which was to be held in trust for said city.

2. The money was placed by said trust company in its general bank account and augmented the general assets of said trust company. It was carried on the books of the trust company under the heading of "Trust Certificates".

3. On June 14, 1932, the city demanded repayment of said sum which was refused by the trust company and said trust company has paid no part thereof to said city.

4. That said trust company was adjudicated a bankrupt on July 9, 1932, and its assets then passed to the trustee in bankruptcy herein.

5. A claim was duly filed by said city for said $45,000.00 and thereafter said claim was duly amended to include a claim of priority in payment and said city was entitled to priority in payment before the other creditors of the bankrupt are paid.

6. Said city was paid the amount of its claim by Standard Accident Insurance Company, surety on a bond for the repayment of said $45,000.00, and said city's claim was duly assigned to said insurance company which is entitled to all the rights of said city, including the right to priority, as aforesaid.

45 Conclusions of Law.

1. The $45,000.00 paid by said city to the Lincoln Trust Company was to be held in trust for said city and constituted a trust fund.

2. Said city being a municipal corporation and an agency of the state of Nebraska, is entitled to the sovereign right of the state of Nebraska to payment of its claim prior to the payment of the claims of general creditors.

3. Said city was entitled to priority under the provisions of Section 64b of the Bankruptcy Act, which allows a priority where such priority exists under the laws of the state and, by Section 49-101 of the C. S. of Nebr. for 1929, the common law was adopted as the law of Nebraska. The common law, as construed by the courts of Nebraska, requires only proof that trust property augmented the general assets in order to secure a priority.

4. The Standard Accident Insurance Company, as surety, for the repayment of said $45,000.00, upon payment thereof to said city and assignment by said city to said insurance company of its rights and claim became entitled to all of the rights of said city and is entitled to payment of said sum of $45,000.00 prior to the payment of the claims of general creditors.

CITY OF LINCOLN, NEBRASKA,
AND STANDARD ACCIDENT
INSURANCE COMPANY,
By Don W. Stewart, Its Attorneys.

46 (Opinion of District Court of October 8, 1934.)

Filed Oct. 8, 1934.

Donohoe, D. J.

Under the undisputed facts in this case, it would seem that the nature and status of the claim of the City of Lincoln was fully determined and established by the decisions of the Circuit Court of Appeals of this Circuit.

In the case of the City and County of Denver vs. Stenger, 295 Fed. 809, involving a claim growing out of almost indentical facts, and where a similar statute with reference to the common law was in force, the Court held that the claim was entitled to the priority accorded a debt due the sovereign under the common law, and held that the rule covered all manners of debts due the State, whether the origin of such be in voluntary imposts or voluntary obligations. The claim being in the nature of a trust or special deposit, the federal rule in regard to tracing trust funds we think applies. This does not involve any rule of property or construction of a state statute, but merely a principle of equity. Mandel vs. Burton, 292 Fed. 127.

In this case there is no dispute but that the funds of the City of Lincoln was received by the Trustee, and commingled with other property, and so lost its identity. In the case last above cited, Judge Kenyon, speaking for the Court, announced the rule:

47 "Where trust property is commingled with other property, so as to lose its identity, it is not, of course, necessary to do the impossible thing, and identify it or lose the lien; but it must appear in order to have any basis for a lien, that the property in the hands of the trustee * * * included in its mass, either the very thing parted with, or its proceeds."

From the evidence it appears that the commingled funds were never at any time exhausted or paid out, and consequently the rule announced by Judge Munger in the case of Peoples National Bank vs. Moore, 25 Fed. (2d) 599, applies, and which is as follows:

"If the trustee mingles money belonging to the trust estate with his own funds, and then pays out some of the funds, it will be presumed that he did that which was lawful, and therefore made his payments out of his own portion of the funds."

We consequently conclude that the City of Lincoln is entitled to priority for the lowest balance prior to bankruptcy,

(Schumacker vs. Harriett, 52 Fed. (2d) 814) which we hold includes cash on hand, cash items, and cash in bank account on May 13, 1932, all of which amounts to the total sum of Twelve Thousand Nine Hundred Seventy-nine Dollars and Forty-two Cents ($12,979.42).

The Order of the Referee will therefore be reversed, and the claimant, City of Lincoln, given priority on its claim to the extent of Twelve Thousand Nine Hundred Seventy-nine Dollars and Forty-two Cents ($12,979.42). The Conclusions of Law and Findings of Fact will be entered in keeping with this Memorandum, and counsel for the claimant will prepare the necessary papers. An exception will be allowed the trustee.

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48 (Order of District Court for Withdrawal of Opinion of October 8, 1934, and for Substitution of New Opinion.)

Filed and Entered at 8:30 A. M. Dec. 12, 1934.

Since the preparation of our Memorandum Opinion, which was filed herein on the 8th day of October, 1934, we have been favored with additional Briefs on behalf of the parties, and have had an opportunity to make a more exhaustive examination of the authorities, in view of which we are now convinced and persuaded that the said Memorandum Opinion should be withdrawn and modified;

It Is Therefore Ordered, that the said Memorandum Opinion filed herein on the 8th day of October, 1934, be and the same hereby is withdrawn, and the Memorandum Opinion, which is hereto attached, substituted in lieu thereof.

By the Court,

J. A. DONOHOE,
United States District Judge.

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49 (Substituted Opinion of District Court.)

Donohoe, D. J.

The facts as shown by the record are that about September 29, 1928, the City of Lincoln issued its check to the order of the Lincoln Trust Company for $45,000.00, which was duly paid, for which the Trust Company issued to the City nine certificates of $5,000.00 each in form as follows:

"No..... Lincoln, Nebraska, September 26, 1928. No.....
This is to certify that the Lincoln Trust Company of Lin-

coln, Nebraska, holds for investment in Trust, funds belonging to City Treasurer of Lincoln, Nebraska, in the sum of Five Thousand and no/100 Dollars ($5,000.00) with interest at three per cent per annum payable quarterly from date until returnable to owner on demand.

This Trust Certificate bears no per cent interest after maturity.

LINCOLN TRUST COMPANY,
By Howard Hadley, Secy."

Interest at 3% was paid to and including the interest payment of March 26, 1932. At the time of the receipt of the city's money, the Trust Company carried all of its funds in its general bank account. While at that time the Company kept separate records in its Trust Department from its general records, this transaction was at all times carried on the general records of the Company, and was never shown as a liability of the Trust Department.

On October 3, 1931, the Trust Compay had trust liabilities of the Trust Department consisting of uninvested balances, cash on hand, and other administrator, executor and guardian accounts, which no doubt were trust funds held by them in trust as administrator, executor and guardian, in an amount of approximately $49,679.17, and on that day there was transferred from the general bank account of the Company to the Trust Department bank account, the foregoing amount. Prior to this date, the company had no separate bank account for Trust Department funds.

The money paid by the City to the Trust Company was carried on the general books of the company listed as Trust Certificates, but the cash was placed in the general bank account. It was so carried under the heading "Trust Certificates" from the time it was paid to the Trust Company until its closing. When the separate bank account for trust funds was started in October, 1931, the money that had been paid in by the city was not transferred to the Trust Department bank account. The company was adjudicated a bankrupt on July 9, 1932.

On or about June 14, 1932, the City made demand for payment to it of the moneys paid to the Trust Company on September 29, 1928. The lowest balance that the Company had in its general bank account up to June 15, 1932, the day after the demand, was on May 13, 1932, at which time the Company had in its general bank account $7,875.97, and cash on hand and cash items, $5,193.45. On June 15, 1932, another

account was set up on the Trust Department books designated as "Segregated Assets" which totalled approximately $44,-982.46, and funds in that amount were taken from the general bank account of the Trust Company and transferred to the Trust Department bank account. This was done for the reason that between April 7, 1932, and June 15, 1932, the Company had received items of principal payment and interest due to persons for whom the Company had collected principal and interest on loans and some payments made between April 7, 1932, and June 15, 1932, on what were known as Eltelic contracts. A sufficient amount of money was taken out of the general bank account, to-wit: approximately $44,-982.46, and deposited in the Trust Department bank account to cover those items and this fund is referred to in the record as the "Segregated Assets" fund. At the time the Company closed on July 9, 1932, there was a balance in the "segregated asset" fund, $25,097.09, which was turned over to the receiver and subsequently to the trustee in bankruptcy.

The lowest balance of cash on deposit in bank, cash on hand, and cash items in the general bank account of the trust Company after June 14, 1932, to the date of bankruptcy was on July 8, 1932, at which time there was actual cash in bank, $629.63, and cash on hand and cash items, $1599.00, which also passed to the Trustee in Bankruptcy.

The Company also received money from persons deposited for investment to whom it issued receipts which were entitled "Modern Investments", and these funds were at all times placed in the general bank account, and were never transferred to the Trust Department nor the Trust Department bank account. It likewise received funds on what it denominated "Eltelic" contracts which were deposited in the general bank account and never transferred to the Trust Department or the Trust Department bank account except as above stated, and also received money from other sources all of which were deposited in the general bank account and never transferred to the Trust Department or Trust Department bank account. Out of the general bank account, the Company paid its own expenses of general operations of its business and any other items that came up, and they were in no way connected or related with the funds segregated or deposited in the Trust Department. While the record is not as clear on this and many other points as might be desired, the testimony also shows that from about October 1928, to the date of bankruptcy the daily deposits varied from $5,-000.00 to $50,000.00.

The City first makes claim of priority of payment out of the assets of the bankrupt estate under Section 64b of the Bankruptcy Act, which insofar as is pertinent to this case provides as follows:

"The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment shall be (7) debts owing to any person who by the laws of the States or the United
51 States is entitled to priority: Provided, That the term "person" as used in this section shall include corporations, the United States and the several States and Territories of the United States."

The claimant contending that the State of Nebraska adopted the common law of England and under the common law the City as an agency of the State, is entitled to priority of payment of its debt, by virtue of its prerogative right as a sovereign, and that subdivision (7) of Section 64 b of the Bankruptcy Act provides for priority of payment in advance of dividends to "debts owing to any person who by the laws of the States or the United States is entitled to priority:" Relying principally upon the cases of: City and County of Denver vs. Stenger, 295, Fed. 809; Marshall vs. New York, 254 U. S. 380; 65 L. Ed. 315; 41 Sup. Ct. Rep. 143; Fiman vs. State of So. Dakota, 29 Fed. (2d) 776.

From a numerical standpoint the weight of state authority is that in those states which have adopted the common law of England by reason of such adoption the states as sovereigns in the absence of some legislation otherwise fixing priority of payment, are entitled to such priority of payment. See notes in 51 A. L. R. 1355; 65 A. L. R. 1331; 90 A. L. R. 184; 46 L. R. A. (ns) 260.

Whether a state [of] virtue of its sovereignty is entitled to priority of payment and whether the priority enjoyed by the state is a prerogative right [of] merely a rule of administration is entirely a matter of local law. The decisions of the highest court of the state as to the existence of the right and its incidents will be accepted by the federal courts as conclusive. Marshall vs. New York, supra. It being merely a matter of local law, if the courts of the state have decided that the state or its municipal subdivisions do not have as sovereigns the prerogative right of priority, such decisions are binding and conclusive upon the federal courts. In the absence of a decision by the state courts, the federal courts will determine the question as a matter of general law. In the Stenger case supra, the circuit court of appeals of this circuit in a case

arising in Colorado before the state courts of Colorado has passed upon the question, held that the City of Denver as an agency of the state, Colorado having adopted the common law, was in an ordinary receivership proceeding, entitled in virtue of the sovereignty of the state which was likewise in the city, to priority of payment against general creditors.

Marshall vs. New York, supra, discusses the question fully. The first constitution of the State of New York (adopted in 1777) provided that the common law of England, which together with the statutes constituted the law of the colony on April 19, 1775, should be and continue the law of the state, subject to such alterations as its Legislature might thereafter make. This provision was embodied in the later New York Constitutions. The courts of New York decided that, by virtue of this constitutional provision, the state, as sovereign, succeeded to the crown's prerogative right of priority, and that the priority was not limited to amounts due for taxes. The decision in Marshall vs. New York, does no more than to give effect to the decisions of the courts of New York on the question.

If the Supreme Court of Nebraska has determined that the state or its municipal subdivisions did not succeed as sovereigns to the prerogative right of priority of payment by the adoption of the common law, then there is no law in Nebraska, statutory or common law which gives priority under Subdivision (7) of 64 b to "debts owing to any person who by the laws of the States * * * is entitled to priority".

In the case of State of Nebraska, ex rel Spillman vs. School District No. 6 of Boone County, in an unreported opinion filed June 16, 1931, claim was made by the School District
52 for priority of payment against the receiver of a failed state bank. The School District contended that under the common law of England, the King was entitled to be paid out of the assets of his debtor subjects in preference to other creditors, and that such preferential rights were adopted in Nebraska by the adoption of the common law. The Commission held however, that the rule obtaining in many states that by the adoption of the common law of England, the states succeeded to the sovereign right of priority of payment, did not obtain in Nebraska. It is true that by virtue of express statute "such proceedings (of the Commission) shall not be published in the reports of the court or in any other reports and shall establish no precedent and be authority only in that particular case." Sec. 2, Chap. 76 Laws of 1925.

Under the law of Nebraska, the Commission merely makes recommendations and the judgment in proceedings before the Commission is rendered by the court. As hereinbefore stated, if the Supreme Court of Nebraska had determined the question, such determination would be binding and conclusive upon the federal courts, and while the proceedings before the Commission approved by the judgment of the court, may not be conclusive, we feel that such holding and judgment should be considered at least persuasive of what the rule is in Nebraska, until the court itself holds otherwise.

However, even tho the Supreme Court of Nebraska, had held that the State and its municipal subdivision were entitled to the prerogative right of priority in ordinary cases, it does not follow that the city is entitled to priority in Bankruptcy. Whether or not a municipal subdivision of a state is entitled to priority must be determined by the provisions of said sub-division (7) Section 64 b.

In the case of Guarantee Title & Trust Company vs. Title Guaranty & Surety Company, 224 U. S. 152, 32 Sup. Ct. Rep. 457, 56 L. Ed. 706, the Supreme Court of the United States, held that the bankruptcy act takes into consideration the whole range of indebtedness of the bankrupt—national, state, and individual—and assigns the order of payment, and notwithstanding that a general statute of the United States gave the United States priority of payment in ordinary cases of insolvency, and in cases of deceased debtors, unless the Bankruptcy Act itself gave it, there was no such right of priority in Bankruptcy. In other words, that the provisions of the Bankruptcy Law, fixing the order of priority governs in bankruptcy cases as against a general statute of the United States or of statutes or common law of the states providing for priority of payment.

Prior to the amendment of 1926, Sec. 64 b provided that the debts to have priority and to be paid in full out of the bankrupt's estate and the order of payment shall be "(5) debts owing to any person who by the laws of the States or United States, is entitled to priority." In the case of Davis vs. Pringle, 268 U. S. 315, 45 Sup. Ct. Rep. 549, the United States claimed priority of payment over other creditors, the claim being that under a Federal Statute, the United States was given priority of payment and therefore the United States was a person given priority under said subdivision (5) as "debts owing to any person who by the laws of the United States is entitled to priority." It was argued by the government that because Sec. 1, subdivision (19) of the Bankruptcy Act, provides that "persons" shall include corporations",

that the United States was a corporation and within the word "persons". The Supreme Court held however, that altho the United States was by general statute given priority of payment, the Bankruptcy Law itself provided a complete scheme and order of priority of payment, and that the United States could not come in under the provision giving priority of payment to "any person who by the laws of the
53 United States is entitled to priority", holding that it was neither a person nor corporation.

Evidently to remedy the situation pointed out in the Pringle case, and to provide for priority to the United States and the States and Territories, Sec. 64 (a) was amended, the subdivisions renumbered and former subdivision (5) of 64 b is now subdivision (7) of 64 b, and provides for priority in advance of the payment of creditors as follows:

"Debts owing to any person who by the laws of the States or the United States is entitled to priority: Provided, that the term 'person' as used in this section shall include corporations, the United States and the several States and Territories of the United States."

It will thus be seen that the only change made was by adding the proviso that the term "person" shall include corporations, the United States and the Several States and Territories of the United States. Assuming therefore, that it were the laws of Nebraska, that debts due the state, its cities, and other municipal subdivisions were entitled to priority of payment in virtue of the sovereign right or for any other reason, the question still is, have municipal subdivisions of the state, been included in the right to priority contained in subdivision (7) of Sec. 64 b as amended?

While this particular subdivision of the statute should be given a liberal construction, Wheeler vs. Johnson, 26 Fed. 2d, 455, we find nothing in it which by the most liberal construction given priority of payment to a city or any other municipal subdivision of the state. If this were a debt due the state, it would plainly be within the 1926 proviso that persons shall include the state because it says so. Congress failed, however, to say that the word "persons" should include cities, counties, school districts or other municipal subdivisions or agencies of the state. It is fair to assume that when Congress used the word "person" and "corporations" in subdivision (7), it intended that "person" and "corporations" means such as are defined in the Bankruptcy Act, except in the case of the "United States and the several States and Territories of the United States", which Congress has specifically provided shall be included within the word "per-

son". The definition of "persons" in subdivision (19) of Section 1 of the Bankruptcy Act is not in our judgment broad enough to cover municipal subdivision of the state. That definition is as follows:

" 'persons' shall include corporations, except where otherwise specified, and officers, partnerships, and women, and when used with reference to the commission of acts which are herein forbidden shall include persons who are participants in the forbidden acts, and the agents, officers, and members of the board of directors or trustees, or other similar controlling bodies of corporations;"

Nor is a municipal corporation included within the term corporations. Subdivision (6) of Section 1 of the Act defining corporations provides that;

" 'corporations' shall mean all bodies having any of the powers and privileges of private corporations not possessed by individuals or partnerships, and shall include limited or other partnership associations organized under laws making the capital subscribed alone responsible for the debts of the associations, and any business conducted by a trustee, or trustees, wherein beneficial interest or ownership is evidenced by certificate or other written instrument."

54 There certainly is nothing in this definition which by the most liberal construction could be said to include a city or municipal corporation.

Again, altho the proviso includes in the term "person" "the several States", by no stretch of the imagination can the word "States," be held to mean municipal corporations. States are defined in subdivision (24) of Paragraph 1, as follows:

" 'States' shall include the Territories and possessions to which this Act is, or may hereafter be, applicable, Alaska, and the District of Columbia;"

Paragraph a of Section 1, provides:

"The words and phrases used in this Act and in proceedings pursuant thereto shall, unless the same be inconsistent with the context, be construed as follows:"

then follow many definitions including the ones heretofore referred to.

We find nothing in the definitions of "persons", "corporations", and "States" as found in said Section 1, which is inconsistent with the context of 64 b (7) and therefore such

definitions should control, except as stated. So holding, it is clear enough that a municipal corporation cannot be brought within either of the words "person", "Corporations" or "States" found in subdivision (7) of 64 b.

The case of City of Denver vs. Stenger, supra, is not determinative of this case for at least two reasons, namely:

1. We feel that some weight should be given to the fact that the supreme court commission, and the supreme court by its judgment, determined that municipal subdivisions of the state were not entitled to priority in virtue of any prerogative of sovereignty and

2. The Stenger case was an ordinary case of insolvency and receivership and the special provisions concerning and governing priority of payment contained in the Bankruptcy Act were not before the court.

Fiman vs. State of South Dakota, supra, also relied upon by the city has no application. That was a case in which the state was claiming priority in virtue of its sovereign right and while the circuit court of appeals in this circuit recognized the rule laid down in the case of the City of Denver vs. Stenger as applicable in ordinary cases of insolvency, it also held that in view of the fact that the National Banking Act provided a complete scheme of distribution of the assets of the bank, such legislation is controlling over any general rule or statute in a state giving priority. So is the Bankruptcy Act in cases in Bankruptcy.

Marshall vs. New York, supra, is not controlling because as heretofore pointed out it does no more than recognize as binding upon the federal courts the decision of the courts of New York on the question of prerogative right of priority of payment. There was not involved in it any question of priority in bankruptcy.

A case sustaining these views is that of In re C. O. Pick Co et al., 9 Fed. 2d, 207. The question before the Court was whether debts due the State Industrial Accident Fund were entitled to priority of payment under 64 b prior to the amendment of 1926 over debts due general creditors of the bankrupt. The state law provided that the amounts due such fund should be deemed prior claims in all bankruptcy proceedings, and while the court held that the Commission was an agency of the state for the discharge of governmental functions, nevertheless it was held to be neither a person nor a corporation as defined by the Bankruptcy Act. So it is clear enough that prior to the amend-

ment of 1926 neither the United States, the states, nor its municipal subdivisions of agencies were within the terms "person" or "corporation". There is nothing in the proviso or amendment of 1926 "that the term 'person' that include corporations, the United States and several States and Territories of the United States", which indicates that it was intended to or does broaden the Act sufficiently to permit the inclusion of cities or other municipal subdivisions or agencies of the state.

The holding in the case of In re Ireland 4 Fed. 2d, 813, seems to be contrary to the holding in the Pick case, but the latter more nearly accords with our view of the correct construction of the Act.

Another contention of the city is that aside from its right of priority as a sovereign the city is entitled to priority because Nebraska had adopted the common law and under the common law as construed by the Supreme Court of Nebraska, trust funds which have augmented the assets of the trustee are entitled to priority. If this contention is sound the city would be entitled to priority of payment to the full amount of its claim, without being required to trace its monies into a particular fund or piece of property which came into the hands of the trustee. This contention cannot be sustained. The rule of law with respect to tracing trust funds does not involve any rule of property or the construction of a state statute but is merely a principle of equity. Hence the decisions of the federal courts must govern rather than the decisions of the courts of the state. Mandel vs. Burton, 292 Fed. 127.

The City's next contention is that it is entitled to priority in payment at least to the extent of the lowest balance in the fund into which it has traced its money on the ground that the funds were trust funds by express contract, or if by reason of the agreement in the contract to pay interest, the transaction is treated as a deposit, it would still be a trust fund on the ground that the trust company had no authority under the laws of Nebraska to receive deposits and therefore in so receiving it as a deposit, the bankrupt became a trustee ex maleficio.

There is considerable doubt whether, taking the contract as a whole, it created a trust relation. It is true that the contract in terms states that the "Company holds for investment in Trust, funds belonging to the City Treasurer of Lincoln, Nebraska". Were nothing more shown than the fore-

going provision of the contract there would be little doubt that the funds were received and held as trust funds. But the agreement to pay interest seems entirely inconsistent with the relation of principal and agent or bailor and bailee or trustee and cestui que trust. It seems to be an anomaly that an agent having no authority to use his principal's money except to invest it in accordance with the directions of his principal would agree to pay interest for the privilege of accepting the burden of agency. The same is true of the relation of bailor and bailee or Trustee and cestui que trust. It is exceedingly unusual to pay for the privilege of accepting a burden instead of a benefit. As said in the Nebraska case of In re State Treasurer's Settlement, 70 N. W. 532-538, quoting from State vs. Bartley, 39 Neb. 353, 58 N. W. 172:

"Whoever heard * * * of a banking institution paying the privilege of holding a special deposit of funds?"

Ordinarily the agreement to pay interest is strongly indicative of a loan of a deposit rather than a bailment or an agency. However, there is nothing whatever in the record to indicate the true nature of the transaction except the contract itself and the fact that interest was paid, and the further fact that the trust company apparently felt perfectly free to use the money, in any manner it saw fit. There are cases holding that where interest is paid, either as a matter of agreement or where interest is required to be paid
56 by law, the transaction is necessarily a loan and not a bailment. See among others, McNulta vs. West, Chicago Park Com'rs, 99 Fed. 900; In re State Treasurer's Settlement, 70 N. W. 532-538, State vs. Bartley, 39 Neb. 353, 58 N. W. 172, cited in the opinion of the Referee. The last cited cases, however, are not conclusive as applied to the facts in this case, as there was not in the cited cases, as there is in the instant case, an express provision or declaration that the funds are held in trust. It is also well settled that a contract must be construed as a whole and its true character determined from the instrument and all the facts and circumstances surrounding it. It is possible for people to do the unusual, and there may have been reasons not disclosed by this record why the trust company was willing to assume the burdens of caring for trust monies and paying for the privilege. In the absence of decisive authority on the question we conclude with some misgivings, that the positive provisions of the contract reciting that the funds were held in trust for investment are not overcome by the agreement to pay interest.

The next question therefore is, how much of the funds that were turned over to the receiver and trustee in bankruptcy

may the city claim as impressed with a trust, or upon which they have an equitable lien? In the case of Empire State Surety Co., vs. Carroll County, 194 Fed. 593-604, in an opinion by Judge Sanborn the rule with reference to tracing trust funds is stated as follows:

"(1) It is indispensable to the maintenance by a cestui que trust of a claim to preferential payment by a receiver out of the proceeds of the estate of an insolvent that clear proof be made that the trust property or its proceeds went into a specific fund or into a specific identified piece of property which came to the hands of the receiver, and then the claim can be sustained to that fund or property only and only to the extent that the trust property or its proceeds went into it. It is not sufficient to prove that the trust propery or its proceeds went into the general assets of the insolvent estate and increased the amount and the value thereof, which came to the hands of the receiver. Peters vs. Bain, 133 U. S. 670, 694, 10 Sup. Ct. 354, 33 L. Ed. 696; Spokane County vs. First Natl. Bank, 68 Fed. 979, 982, 16 C. C. A. 81, 84; Board of Com'rs vs. Patterson (C. C.) 149 Fed. 229; Frelinghuysen vs. Nugent, (C. C.) 36 Fed. 229, 239; Board of Com'rs vs. Strawn, 157 Fed. 49, 51, 84 C. C. A. 553, 555, 15 L. R. A. (N. S.) 487, 116 Am. St. Rep. 225, 7 Ann. Cas. 551; Cherry vs. Territory, 17 Okl. 213, 89 Pac. 190; St. Louis Brewing Assn. vs. Austin, 100 Ala. 313, 13 South. 908; Little vs. Chadwick, 151 Mass. 109, 23 N. E. 1005, 7 L. R. A. 570; Howard vs. Fay, 138 Mass. 109, 23 N. E. 1005, 7 Brigham, 142 Mass. 248, 7 N. E. 851; Erie Ry. Co. vs. Dial, 140 Fed. 689, 72 C. C. A. 183; Ferchen vs. Arndt, 26 Or. 121, 37 Pac. 161, 29 L. R. A. 664, 46 Am. St. Rep. 603; Blake vs. State Savings Bank, 12 Wash. 619, 41 Pac. 909, 910; In re North River Bank, 60 Hun. 91, 14 N. Y. Supp. 261; Williams vs. Van Norden Trust Co. 104 App. Div. 251, 257, 93 N. Y. Supp. 821; Bishop vs. Mahoney, 70 Minn. 238, 73 N. W. 6; Nonotuck Silk Co. vs. Flanders, 87 Wis. 237, 58 N. W. 383; Burnham vs. Barth, 89 Wis. 362, 366, 62 N. W. 96; Bradley vs. Chesebrough, 111 Iowa 126, 82 N. W. 472; Lebanon Trust & Safe Deposit Bank's Assigned Estate, 166 Pa. 622, 31 Atl. 334; Marquette Fire Com'rs vs. Wilkinson, 119 Mich. 655, 670, 78 N. W. 893, 44 L. R. A. 493; Hauk vs. Van Ingen, 196 Ill. 20, 39, 63 N. E. 705; Ellicott vs. Kuhl, 60 N. J. Eq. 333, 46 Atl. 945; Ober vs. Cochran, 118 Ga. 396, 45 S. E. 382, 98 Am. St. Rep. 118; In re Mulligan (D. C.) 116 Fed. 715, 717, 718; Holmes vs. Gilman, 138 N. Y. 369, 376, 34 N. E. 205, 20 L. R. A. 566, 34 Am. St. Rep. 463; In re Hicks, 170 N. Y. 195, 198, 63 N. E. 276.

"(2) Proof that a trustee mingled trust funds with his own and made payments out of the common fund is a suf-

ficient identification of the remainder of that fund coming to the hands of the receiver, not exceeding the smallest amount the fund contained subsequent to the commingling (Board of Com'rs. vs. Strawn, 157 Fed. 49, 51, 84 C. C. A. 553, 555, 15 L. R. A. (N. S.) 1100; Weiss vs. Haight & 57 Freese Co. (C. C.) 152 Fed. 479; American Can Co. vs. Williams, 178 Fed. 420, 423, 101 C. C. A. 634, 637) as trust property, because the legal presumption is that he regarded the law and neither paid out nor invested in other property of the trust fund, but kept it sacred (Board of Com'rs. vs. Patterson (C. C.) 149 Fed. 229, 232; Spokane County vs. First National Bank, 68 Fed. 979, 16 C. C. A. 81)."

The rules as thus stated has been many times followed and reiterated in this circuit. Applying the foregoing rule to the facts in this case we find that the city's money was originally deposited in the trust company's general bank account, and mingled with other monies belonging to the bankrupt and others.

On October 3, 1931, there was withdrawn from the general bank account $49,679.17, which were funds that the bankrupt held in a trust capacity such as executor, administrator, and the like, and that amount was deposited in the trust department bank account, an account and fund separate and apart from the general fund bank account. It is perhaps unnecessary to discuss this transaction as the city nowhere in its briefs makes any claim of a lien upon this fund, and in the petition for review no error is assigned of the failure of the Referee to give the city a lien upon this fund. However, in view of the fact that the Referee held that the city's money was not held in trust, and we have held otherwise, this item should perhaps be discussed.

We do not think that the claimant is entitled to make any claim against any balance in the fund carried in the trust department bank account to cover monies held as administrator, etc., for the following reasons: The testimony is that up until October 3, 1931, all of the bankrupt's money was carried in its general bank account, and that city's money had been deposited therein. That on October 3, 1931, there was withdrawn, $49,679.17. The testimony is that the city's money was not withdrawn from the general bank account and deposited in any trust fund bank account at that time because there was not enough money segregated, whatever that may mean. It is indispensable to the maintenance by the city of a claim to preferential payment that clear proof be made that its trust property went into the fund withdrawn on October 3, 1931, and then the claim can be sustained to that

fund only to the extent that its money went into it. It will be presumed that when the bankrupt withdrew from the general bank account this $49,679.17, it respected the city's trust fund as it then existed and withdrew only monies not impressed with the trust. Empire State Surety Co. vs. Carroll County, supra; Peoples National Bank vs. Moore, 25 Fed. 2d, 599. Assuming that the bankrupt commingled two trust funds, had it paid one of the cestui que trustents, it would be presumed that the bankrupt paid the one in the legal order of priority of payment. Likewise when the bankrupt took from the commingled fund the funds of one cestui que trustent and placed those funds in a separate fund for his benefit, it will also be presumed that the trustee segregated the commingled trust funds in strict accordance with the legal rules applicable to separation of commingled trust funds.

Neither is the city entitled to a lien or to claim as trust any part of the $25,000.00 which was turned over to the trustee and which was the balance at the date of adjudication in what is called the "segregated asset" account. As heretofore shown this account arose in this way. Between April 7, and June 15, 1932, collections of principal and interest and on so-called Eltelic accounts were made from various persons to the extent of $44,982.46 and the proceeds deposited in the general bank account and on June 15, 1932, the last mentioned amount was withdrawn from the general bank account, and placed in the trust department bank account or trust funds to cover such collections. The source from which this $44,892.46 came from is undisputed. It was monies of others which was placed in the general fund bank account between April 7 and June 15, 1932, and not a part of the city's
58 money, and whether the money which was placed in the general bank account between April 7, and June 15 was the money of the bankrupt or others is immaterial. If at the time this sum was deposited and withdrawn, the trust fund had been depleted, the trust claimant is not entitled to a lien upon the funds thus replaced in the account. The rule is thus stated in 65 C. J. 976-7:

If the mingled fund is, at any time, reduced to below the amount of the trust fund, it will be regarded as dissipated to that extent so that the limit of the cestui que trust's recovery will be the lowest amount to which the fund has been depleted, and sums subsequently added to the fund from other sources will not be treated as a part of the trust fund" • • •

Citing a number of state and federal cases including decisions of the Supreme Court of the United States. See also

Colorado Milling and Elevator Co. vs. Cunningham, 7 Fed. Sup. 965.

If the trust fund was not depleted during the period April 7 to June 15, 1932, in whole or in part, the bankrupt had the right to place other funds in the general bank account and withdraw them, as by so doing the city's lien was not in any degree impaired. It is conceded that on May 13, 1932, the trust fund was depleted to the extent of $13,069.42. So far as this record shows after the $44,982.46 was withdrawn from the general fund on June 15, 1932, there was left in the general bank account more than sufficient to satisfy any lien the city may have had on that date to the extent of $13,069.42. If so, the city cannot complain that other monies upon which it had no lien were either deposited in or withdrawn from the general bank account. Here again it is presumed that when the bankrupt withdrew this sum of $44,982.46, from its general bank account and deposited it in the trust fund bank account it withdrew only monies which it had a right to withdraw and on which the city had no lien. Empire State vs. Carroll, and Peoples National Bank vs. Moore, supra.

It is well settled that a claimant of a trust fund is entitled to recover from a receiver or trustee in bankruptcy only such an amount as the claimant can trace into a particular fund to the extent that that fund has passed into the hands of a receiver or trustee. While it is true that on May 13, 1932, there was in the general bank account, the fund into which the city had traced its money, $13,069.42, that fund had been reduced at the date of bankruptcy to $628.63, and there came into the hands of the trustee from that fund only the latter amount. There also came into his hands cash items consisting of cash in the till of $599.00 and a $1,000.00 debit ticket to be charged against the expense account. This city is not entitled to any claim or lien upon the cash in the till amounting to $599.00 or the $1,000.00 debit ticket which was to be charged against the expense account for the reason that it has not traced its funds into either of those items. If the testimony showed that either of these items had come from the general fund bank account which was the only fund into which the city traced its money, we would have a different question. Some support for a claim upon the cash in the till and the debit ticket cash item is found in the case of Schumacher vs. Harriett, 52 Fed. 2d, 817. In that case two checks were delivered by the claimant to a bank with directions to the officers of the bank to purchase bonds of the United States with a portion of the funds represented by the checks. The bank agreed to purchase the bonds and the claimant was given immediate credit

for the checks. The checks were forwarded by the bank for credit to two different correspondent banks. The balance to the credit of the forwarding bank in each of the correspondent banks was or several days after the receipt of the checks in an amount considerably in excess of the checks deposited. Gradually however, the balances were reduced until at the time of the failure of the forwarding bank in which the checks were originally deposited, the balance in each of the correspondent banks was exhausted. Among other things,
the court reached the conclusion that the checks were
59 received by the bank as cash and were treated by it
as such, and that they increased the cash and cash items in the tills of the bank at the time, and that when the failed bank placed the checks to its credit in the correspondent banks, it was dealing with them as its own and the presumption was that the cash which was left in its tills was intended to be subject to the trust. That while it had the right to collect the checks it had no right to place the proceeds to its credit in other banks without holding an equivalent amount in cash in its own vaults to satisfy the trust which it had assumed toward the claimant. We think this case is an unwarranted extension of the federal rule of tracing trust funds.

The same question was before the Circuit Court of Appeals of the 5th Circuit in the case of Pottorff vs. Key, 67 Fed. 2d, 833, and that court reached an opposite conclusion. Discussing the case of Schumacher vs. Harriett, supra, that court said;

"Schumacher vs. Harriett (C. C. A.) 52 Fed. (2d) 817, 82 A. L. R. 1, is much relied on to sustain the judgment appealed from. The court there reviews the cases and concedes that they establish such principles as we have just asserted, but avoids their consequences by the novel view that a trust check, when treated by a bank as one of its cash items, is thereby confused with its cash as though it had been unidentifiable currency; and that, if the bank misuses the check, it thereby sets apart as a trust res an equivalent value of other cash assets. Such a doctrine amounts to saying that in every case of misapplied money or money's equivalent the wrongdoer's other cash and cash items stand in its place so long as he has any, establishing in effect a general lien on all such. 'If the plaintiff's contention be well founded, and to follow misappropriated moneys it is only necessary to show that a receiver has, and that the trustee had, assets, the rule is simply that a demand for such moneys is a preferred claim against any substantial estate. To adopt this view is to do

away with all the equitable principles out of which the right to follow trust funds grew.' American Can Co. vs. Williams (C. C. A.) 178 Fed. 420, at page 423. We hold in this connection that, if a trust res can be followed, it must be; and that a lien by confusion can be fixed on a fund only when the confusion is actual and when the fund is shown to have really received and to still contain the trust res or its proceeds."

The Circuit Court of Appeals of the 5th Circuit again refused to follow the case of Schumacher vs. Harriett on this proposition, in Wisdom vs. Keen. 69 Fed. 2d, 349. We think the decisions of the Circuit Court of Appeals of the 5th Circuit should be followed. It follows that the most that can be allowed as a preferred and prior claim is the item of $628.63, the amount of money in the general fund bank account into which the city traced its money and which came into the hands of the trustee, and the balance of the city's claim should be allowed as a general claim.

The city is not entitled to satisfy its lien out of the securities deposited with the Department of Trade and Commerce as it is clearly not within Sec. 8-212 Compiled Statutes of Nebraska 1929, which is as follows:.

"Fund Deposited Liable for Trust Liabilities. The fund deposited as provided in section 9 (8-209), shall be primarily liable for obligations of such company as guardian, curator, executor administrator, assignee, receiver, trustee, either by appointment of court or under will, and for depository of money in court and shall not be liable for any other debt or obligation of the corporation until all trust liabilities aforesaid have been discharged. (1919 P. 722; C. S. 1922, 8074)." While most of the securities deposited with the Department of Trade and Commerce were deposited after the city's money was paid to the bankrupt, there is nothing to show when they were purchased. They may have been purchased long before the bankrupt received the city's money. In any event it will here again be presumed that the purchases were not made with the city's money. The city's money has not been traced into these securities.

We have discussed this matter as though the city was still the owner of the claim. It appears by stipulation, that the Standard Accident Insurance Co., executed to the city, a bond to protect it from the loss of this fund, and that the insurance company has paid to the city, the full amount of its claim, and the city has assigned to the company all its rights

against the bankrupt. In view of what has been heretofore said, it is unnecessary to determine whether or not a surety who has paid a claim upon which the state was entitled to priority of payment in virtue of its sovereignty is entitled to be subrogated to such sovereign right of priority upon payment of the claim to the sovereign. The following federal cases hold that it is. U. S. F. & G. Co. vs. Union Bank, 228 Fed. 448; American Bonding Co. vs. Reynolds, 203 Fed. 356. See also notes in 32 A. L. R. 846; 24 A. L. R. 1502; 83 A. L. R. 1131, 90 A. L. R. 207, from which notes it would appear that the weight of state authority is in favor of the rule subrogating the surety to the state's prerogative right of priority.

The order of the Referee is therefore modified to the extent of allowing the claim as a preferred claim in the sum of $628.63, and the balance of the claim in such an amount as the Referee shall find it to be, should be allowed as a general claim.

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61 Findings of Fact and Conclusions of Law.

Filed at 8:30 A. M., Dec. 17, 1934.

In the District Court of the United States, for the District of Nebraska, Lincoln Division.

In the Matter of

Lincoln Trust Company, Bankrupt.

No. 2314. In Bankruptcy.

In Re: Claim of the City of Lincoln.

This Cause came on to be heard before the court on the petition for review of an order of the referee disallowing the claim of the City of Lincoln, Nebraska, and Standard Accident Insurance Company, its assignee, for priority in the payment of its amended claim, and the parties appearing by their respective counsel, and the court being fully advised in the premises makes the following findings of fact and conclusions of law:

Findings of Fact.

1. On September 29, 1928, the City of Lincoln, in the State of Nebraska, a municipal corporation and an agency of the State of Nebraska, paid to the Lincoln Trust Company $45,000.00 which was to be held in trust for said city.

2. The money was placed by said trust company in its general bank account, thereby augmenting the general assets

of said trust company and was carried on the books of the trust company under the heading of "Trust Certificates".

3. On June 14, 1932, the city demanded repayment of said sum which was refused by the trust company and said trust company has paid no part thereof to said city.

4. Said trust company was adjudicated a bankrupt on July 9, 1932, and its assets then passed to the trustee in bankruptcy herein.

5. A claim was duly filed by said city against the bankrupt for said $45,000.00 and thereafter said claim was duly amended to include a claim of priority in payment and said city has, ever since said amendment was allowed,
62 claimed a priority in the payment of said $45,000.00 because it was a trust fund, entitling it to priority under the laws of the State of Nebraska, and because it was entitled to the priority of a sovereign under the laws of Nebraska.

6. The assets of the bankrupt which passed to the Trustee in Bankruptcy included $628.63 of the funds paid by said city to said trust company which amount was the lowest balance of cash in the bank account of said trust company prior to bankruptcy. There was also cash in the till of said trust company of $599.00 at the time of bankruptcy.

7. Subsequent to the hearing on the right of said city to priority the Standard Accident Insurance Company paid said city the amount of its amended claim and said amended claim was then duly assigned to said insurance company and said insurance company then became entitled to all the rights of said city under said amended claim.

Conclusions of Law.

1. Said City of Lincoln is now and has been since prior to September 29, 1928, a municipal corporation, and at the time of the assignment of said amended claim to the Standard Accident Insurance Company, was entitled to the payment of $628.63 of its amended claim prior to the payment of the claims of general creditors.

2. The sum of $45,000.00 paid by said city to the Lincoln Trust Company on September 29, 1928, was to be held in trust for said city and constituted a trust fund.

3. The Standard Accident Insurance Company, as assignee of said amended claim, became entitled to all of the rights of said city under said amended claim, including the right to payment of $628.63 of the amount of said amended claim prior to the payment of the claims of general creditors.

63 4. A judgment and decree should be entered herein ordering and directing the Referee to allow priority in the amount of $628.63 of said amended claim which sum shall be paid prior to the payment of claims of general creditors and the balance of said amended claim shall be allowed as a general claim.

5. The City of Lincoln and Standard Accident Insurance Company & Trustee are each allowed an exception.

Dated this 15th day of December, 1934.

J. A. DONOHOE,
District Judge.

O. K. as to form,
Don W. Stewart,
Atty. for Claimant.

R. A. Boehmer,
Atty. for Trustee.

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64 Judgment and Decree.

Filed at 8:30 A. M., Dec. 17, 1934.

In the District Court of the United States, For the District of Nebraska, Lincoln Division.

In the Matter of

Lincoln Trust Company, Bankrupt.

No. 2314. In Bankruptcy.

In Re: Claim of the City of Lincoln.

This Cause came on to be heard before the court on the petition for review of an order of the referee disallowing the claim of the City of Lincoln, Nebraska, and the Standard Accident Insurance Company, its assignee, for a priority in the payment of its amended claim, and was argued by counsel, and the court having made findings of fact and conclusions of law in the premises, it is ordered, adjudged and decreed as follows, to-wit:

The order of the Referee disallowing priority in the payment of said amended claim is hereby modified to the extent of allowing priority in the amount of $628.63, said sum to be paid prior to the claims of general creditors and the balance of the claim is allowed as a general claim. To all of which

City of Lincoln and Standard Accident Insurance Company and Trustee each except and exceptions are hereby allowed.

Dated this 15th day of December, 1934.

J. A. DONOHOE,
District Judge.

O. K. as to form,
Don W. Stewart,
Atty. of Claimant.

R. A. Boehmer,
Atty. for Trustee.

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65 (Notice of Appeal by City of Lincoln, et al.)

(Filed in U. S. District Court at 12:05 P. M. Dec. 28, 1934.)

To L. A. Ricketts, Trustee in Bankruptcy of Lincoln Trust Company, Bankrupt, or R. A. Boehmer, his attorney of record:

You are hereby notified that the City of Lincoln, Nebraska and Standard Accident Insurance Company hereby appeal from the judgment and decree filed herein on December 17, 1934 by the District Court of the United States for the Lincoln Division of the District of Nebraska allowing a priority in the sum of $628.63 in the payment of the amended claim filed by said City of Lincoln, said appeal being taken to the United States Circuit Court of Appeals for the Eighth Circuit.

Dated December 26th, 1934.

CITY OF LINCOLN, NEBRASKA
AND STANDARD ACCIDENT
INSURANCE COMPANY,
By Don W. Stewart,
A. A. Whitworth,
C. B. Paine,
Their Attorneys.

Service of the foregoing notice accepted December 26th, 1934.

L. A. RICKETTS,
Trustee in Bankruptcy of Lincoln Trust Company, Bankrupt.
By R. A. Boehmer, His Attorney.

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66 (Petition of City of Lincoln, Nebraska, et al., for Appeal.)

(Filed in U. S. District Court at 12:05 P. M. Dec. 28, 1934.)

The City of Lincoln, Nebraska and Standard Accident Insurance Company, feeling aggrieved by the judgment and decree filed in the above entitled cause on December 17, 1934 do hereby appeal from said judgment and decree to the United States Circuit Court of Appeals for the Eighth Circuit for the reasons set forth in the assignment of errors filed herewith, and said petitioners pray that their appeal be allowed and that citation be issued as provided by law, to L. A. Ricketts, Trustee in Bankruptcy of said Lincoln Trust Company, Bankrupt, and that a transcript of the record, proceedings and documents upon which said judgment and decree was based duly authenticated, be sent to the United States Circuit Court of Appeals for the Eighth Circuit under the rules of such court in such cases made and provided, and your petitioners further pray that the proper order be made providing the security to be required of them.

DON W. STEWART,
A. A. WHITWORTH,
C. B. PAINE,
Attorneys for Petitioners.

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67 (Assignment of Errors on Appeal of City of Lincoln, et al.)

(Filed in U. S. District Court at 12:05 P. M. Dec. 28, 1934.)

Come now the appellants in the above entitled cause and file the following assignment of errors upon which they will rely in the prosecution of the appeal herewith petitioned for in said cause from the decree of this court filed herein on December 17, 1934.

1. The court erred in holding that the City of Lincoln's amended claim was not entitled to the priority accorded a sovereign at common law, which by Nebraska Statute is made a part of the Nebraska law.

2. The court erred in holding that the amended claim was not entitled to priority for the full amount as a trust fund under the laws of the State of Nebraska.

3. The court erred in holding that only $628.53 of the funds paid by the City of Lincoln to the bankrupt were traced into the hands of the Trustee in Bankruptcy.

4. The court erred in holding the amended claim was not entitled to payment from securities deposited with the Department of Trade and Commerce of the State of Nebraska.

5. The court erred in holding cash and cash items should not be included with cash in the bank account in determining the amount of the funds paid by the City of Lincoln to the bankrupt, which passed to the Trustee in Bankruptcy.

6. The court erred in holding the opinion of a Supreme Court Commissioner of the State of Nebraska should be considered as establishing the rule that the common law right of a sovereign to priority in payment of its claim is not a part of the law of Nebraska.

68 7. The court erred in sustaining the finding of the Referee that the common law right of a sovereign to priority in the payment of its claim is not a part of the law of Nebraska.

8. The court erred in sustaining the finding of the Referee that the amended claim was not entitled to priority for the full amount as a trust fund under the laws of the State of Nebraska.

9. The court erred in sustaining the finding of the Referee that the amended claim was not entitled to payment from securities deposited with the Department of Trade and Commerce of the State of Nebraska.

10. The court erred in holding that a municipal corporation is not within the provisions of subdivision 7 of Section 64-b as amended, of the Bankruptcy Act, U. S. C. A. Title 11, Section 104-b (7) allowing priority to "debts owing to any person who by the laws of the State and the United States is entitled to priority."

11. The court erred in refusing to direct the payment of the entire amended claim prior to the payment of claims of general creditors.

Wherefore, appellants pray that the judgment and decree filed herein on December 17, 1934 be modified by directing the payment in full of the amended claim of appellants prior to the payment of the claims of general creditors and for such

other and further relief as to the court may seem just and proper.

Dated December 26, 1934.

CITY OF LINCOLN, NEBRASKA
AND STANDARD ACCIDENT INSURANCE COMPANY, Appellants,
By Don W. Stewart,
A. A. Whitworth,
C. B. Paine.

69 United States of America,
State of Nebraska,
Lancaster County—ss.

Don W. Stewart, being first duly sworn upon his oath, deposes and says that he is attorney for the appellants; that appellants are each corporations and for that reason he makes this verification; that he has read over the foregoing assignments of error, knows the contents thereof and that the facts therein stated are true as he verily believes.

DON W. STEWART.

Subscribed and sworn to before me this 26th day of December, 1934.

CHARLES B. PAINE,
(Notarial Seal) Notary Public.

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70 (Waiver of Notice of Appeal by City of Lincoln, et al.)

(Filed in U. S. District Court at 12:05 P. M. Dec. 28, 1934.)

Receipt is hereby acknowledged of a copy of petition for appeal and assignment of errors to be filed in the above entitled court and relating to the decree filed in the District Court of United States for the District of Nebraska, Lincoln Division on December 17, 1934, and the undersigned hereby waives notice of hearing on said petition and consents to the immediate allowance of said petition for appeal.

Signed December 27th, 1934.

L. A. RICKETTS,
Trustee in Bankruptcy of Lincoln Trust Company, Bankrupt,
By R. A. Boehmer,
His Attorney of Record.

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71 (Order Allowing Appeal to City of Lincoln, et al., by U. S. District Court.)

(Filed and Entered in U. S. District Court at 2:10 P. M. Dec. 29, 1934.)

This cause came on for hearing upon the petition of City of Lincoln and Standard Accident Insurance Company for an appeal from the judgment and decree entered in this cause by the District Court of the United States for the District of Nebraska, Lincoln Division, on December 17, 1934.

Upon due consideration whereof it is ordered said appeal is hereby allowed.

It is further ordered that petitioners file a bond in the sum of $500.00.

Signed this 29th day of December, 1934.

By the Court:

J. A. DONOHOE,
Judge.

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72 (Citation on Appeal of City of Lincoln, et al., and Acceptance of Service.)

(Filed in U. S. District Court, at 3 P. M., Dec. 31, 1934.)

In the District Court of the United States for the District of Nebraska, Lincoln Division.

In the Matter of Lincoln Trust Company, Bankrupt.

Case No. 2314

In Bankruptcy.

In Re Claim of City of Lincoln.

United States of America—ss.

To L. A. Ricketts, as Trustee in Bankruptcy of Lincoln Trust Company, Bankrupt:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit at the City of St. Louis, Missouri, forty days from and after the date of this citation pursuant to an appeal filed in the Clerk's office of the District Court of United States, District of Nebraska, Lincoln Division wherein City of Lincoln, Nebraska, and Standard Accident Insurance Company are appellants and you are appellee, to show cause, if any there be, why the judgment and decree filed herein on De-

cember 17, 1934, as in said appeal mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness the Hon. James A. Donohoe, United States District Judge for the District of Nebraska, Lincoln, Nebraska, on December 29th, 1934.

J. A. DONOHOE,
District Judge.

Comes now L. A. Ricketts, as Trustee in Bankruptcy of Lincoln Trust Company, Bankrupt, appellee and hereby accepts service of the citation on appeal in the above cause dated December 31st, 1934, and does hereby enter his appearance in the Circuit Court of Appeals of the Eighth Circuit.

L. A. RICKETTS,
Trustee in Bankruptcy of
Lincoln Trust Company,
Bankrupt,
By R. A. Boehmer,
His Attorney of Record.

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73 (Bond on Appeal of City of Lincoln, et al.)

(Filed in U. S. District Court Dec. 29, 1934.)

Know All Men By These Presents:

That the Standard Accident Insurance Company of Lincoln, Nebraska, and City of Lincoln, as principals, and Globe Indemnity Company, New York, N. Y., as surety, are held and firmly bound unto L. A. Ricketts, as Trustee in Bankruptcy of Lincoln Trust Company, Bankrupt, in the sum of Five Hundred Dollars ($500.00) to be paid to said L. A. Ricketts, as Trustee in Bankruptcy of Lincoln Trust Company, Bankrupt, its successors and assigns, for which payment, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally by these presents.

Dated this 29th day of December, 1934.

Whereas, a judgment and decree was rendered by the above entitled court in the above entitled proceedings on December 17, 1934, from which said principals have petitioned

for and have been allowed an appeal to the Circuit Court of Appeals for the Eighth Circuit.

Now, Therefore, the condition of the above obligation is that if said appellants shall prosecute their appeal to effect and without delay and answer all damages and costs if said decree be affirmed, then the above obligation to be void, otherwise to remain in full force and effect.

STANDARD ACCIDENT INSURANCE COMPANY, and
CITY OF LINCOLN, Principals,
By Don W. Stewart, Their Attorney.

GLOBE INDEMNITY COMPANY, Surety,
By C. E. Hinds, (Corporate Seal)
Attorney-in-fact.

The foregoing bond and surety thereon hereby approved.

J. A. DONOHOE,
District Judge.

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74 (Stipulation as to Appeals and as to Transcript of Record in Connection Therewith.)

Filed at 12:05 P. M. Dec. 28, 1934.

Whereas, the undersigned appellants intend to appeal from the judgment and decree filed in the above entitled matter on December 17, 1934, and intend to request the allowance of an appeal by the above entitled court and also by the Circuit Court of Appeals of the Eighth Circuit, and

Whereas, the appellee may desire to take a cross-appeal,

Now Therefore, it is hereby stipulated and agreed by and between the appellants and the appellee that the transcript of the record, proceedings and papers which may be transmitted by the Clerk of the above entitled court to the Circuit Court of Appeals of the Eighth Circuit pursuant to its order allowing said appeal, shall also be treated and considered as the transcript of the record proceedings and papers for the appeal allowed by the District Court of the United States for the District of Nebraska, Lincoln Division and for a cross-appeal if the appellee should desire to take a cross-appeal and said transcript of the record shall be considered as having been filed in each of the aforesaid appeal proceed-

ings, and both of said appeals shall be briefed, argued and treated as one appeal.

DON W. STEWART,
A. A. WHITWORTH,
C. B. PAINE,
Attorneys for Appellants.

R. A. BOEHMER,
Attorney for Appellee.

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75 Statement of the Evidence.

Filed at 2:10 P. M. Dec. 29, 1934.

In the District Court of the United States for the District of Nebraska, Lincoln Division.

In the Matter of

Lincoln Trust Company, Bankrupt.

Case No. 2314 In Bankruptcy.

In Re Claim of City of Lincoln.

On December 10, 1932, this cause came on for hearing before D. H. McClenahan, Referee in Bankruptcy, upon the claim of the City of Lincoln, Nebraska, to priority on its amended claim filed against the above named bankrupt and upon the objections of L. A. Ricketts, Trustee of said bankrupt to such priority and upon the City of Lincoln's reply to said answer. On February 21, 1934, Trustee's motion for leave to withdraw its submission and to file additional objections and adduce further evidence in support of such objections was sustained over the objections of the City of Lincoln and further evidence was thereupon received. At such hearings the aforesaid parties were each represented by counsel. Thereafter on September 7, 1934, this cause came on for hearing before the above entitled court upon the petition of said City of Lincoln and Standard Accident Insurance Company, assignee of said amended claim, to review the order of said Referee denying the right of priority in the payment of said amended claim. At such hearing the aforesaid parties were each represented by counsel. The following is a true and correct statement in narrative form of all of the evidence received in the hearings before said Referee and which evidence was thereafter received in the hearing before this court upon the petition for review of the aforesaid order of the Referee.

The following stipulation was offered by said City of Lincoln and was received in evidence at the hearing on December 10, 1932.

"It is hereby stipulated and agreed by and between L. A. Ricketts, Trustee in Bankruptcy of Lincoln Trust Company, hereinafter referred to as bankrupt, and City of Lincoln, Nebraska, hereinafter referred to as claimant, that the following is a correct statement of facts and the truth of such facts is hereby admitted by the parties hereto and shall be accepted as true in connection with the amended claim of City of Lincoln, Nebraska, without further proof.

76 "1. Claimant is now and at all times hereinafter mentioned was a municipal corporation organized and existing under the laws of the State of Nebraska. E. M. Bair is now and at all times hereinafter mentioned was the city treasurer of said claimant.

2. Bankrupt at all times hereinafter mentioned up to July 9, 1932, was a corporation organized and existing under the laws of the State of Nebraska and engaged in conducting a general trust company business with its place of business in Lincoln, Nebraska.

3. On September 26, 1928, E. M. Bair as city treasurer of said claimant paid to bankrupt the sum of Forty-five Thousand Dollars ($45,000.00) which was funds of claimant. Said bankrupt thereupon executed and delivered to said claimant nine (9) certificates in the sum of Five Thousand Dollars ($5,000.00) each, payable on demand. The following is a copy of one of the said certificates, and the other eight certificates were the same, except as to their number:

"No. Lincoln, Nebraska, Sept. 26, 1928 No.....

This Is To Certify that the Lincoln Trust Company of Lincoln, Nebraska, holds for investment in Trust funds belonging to City Treasurer of Lincoln, Nebraska, in the sum of Five Thousand & no/100 Dollars ($5,000.00) with interest at 3 per cent per annum payable quarterly from date until returnable to owner on demand 19....

This Trust Certificate bears no per cent interest after maturity.

LINCOLN TRUST COMPANY,
By (S.) Howard Hadley, Secretary."

Said $45,000.00 was placed by said bankrupt in its general fund and the following entry was made on a ledger sheet of said bankrupt:

Trust Certificate	City Treasurer of Lincoln	Credit	Balance
10-1-28	By 160-162 to 169 inclusive $5000.00 each at 3% on demand	45,000.00	45,000.00

4. Thereafter said bankrupt paid interest to said claimant at the rate of 3 per cent per annum up to March 26, 1932. There is due and owing from said bankrupt to claimant on said certificates the following:

77	Principal	$45,000.00
	Interest thereon at three per cent per annum from March 26, 1932 to June 15, 1932	302.45
	Interest thereon at the legal rate of seven per cent from June 15, 1932, to July 9, 1932, the date of filing the petition and of adjudication of bankruptcy of Lincoln Trust Company	206.55
	Total	$45,509.00

5. That no part of said debt has been paid; that there are no set-offs or counter-claims to the same; and that said claimant has not had or received any manner of security for said debt whatever.

6. Pursuant to the provisions of the statutes of Nebraska, the bankrupt deposited certain securities with the Department of Trade and Commerce of the State of Nebraska. The following is a description of the securities now held by said department, the par value thereof, and the date deposited with said department by bankrupt:

Description	Amount	Date Deposited
St. Louis & San Francisco R. R. Bond due 3-1-78	5000.00	9-14-28
Susquehanna Silk Co. Bond due 6-1-08	5000.00	5- 6-30
Tennessee Products Co. Bond due 1-1-36	5000.00	5- 6-30
Koenigstein Bond due 11-1-36	7000.00	11- 1-26
Westminister Presbyterian Church Bond due 3-1-39	10000.00	11-22-29
Mayer Bldg. Co., Bond due '39	2000.00	11- 4-31
Emery Bond due 8-12-38	3000.00	11-17-31
Perlinger Bond due 1-10-33	2000.00	11-19-31
Curtis Intersection Paving Bond due 11-1-34	2000.00	11-21-31
City of Lincoln District Paving Bond due 7-1-40	1000.00	11-17-31
Village of Wolbach Paving Bond due 11-1-34	5000.00	1-20-27
	$47000.00	

78 7. It is further stipulated that either or both parties reserve the right to object to any of the matters herein stipulated on the ground of competency or materiality, and it is further agreed and understood that either party may introduce further or other testimony or evidence as may be desired.

The foregoing stipulation signed this 10th day of December, 1932.

CITY OF LINCOLN, NEBRASKA,
By Max Kier &
Lloyd E. Chapman,
Its Attorneys.

L. A. RICKETTS,
Trustee in Bankruptcy of Lincoln Trust Company.
By R. A. Boehmer, His Attorney."

CHRIS O. SCHLYTERN called as a witness by said City of Lincoln testified he was at the time of his testimony employed by the Trustee of the bankrupt and had been since the Trustee's appointment. He was Assistant Trust Officer of the bankrupt from July 16, 1923 to January 15, 1931 and then Trust Officer from that date until it was adjudicated a bankrupt. He was in charge of its Trust Department and had general knowledge of all the books and records of the Company but more especially in the Trust Department. He knew how the payment by the City of Lincoln of certain funds to the Lincoln Trust Company in 1928 was handled in the books and records of the Company. It was posted on the ledgers and credited to "Trust Certificates" on the books on October 1, 1928 showing a credit of $45,000.00 under the heading of "City Treasurer, Lincoln Trust Certificates". A record was kept in the Trust Department separate from the general records of the Company at that time. The transaction was shown on the general records of the Company. It was not shown as a liability of the Trust Department. There was a separate record of the liabilities of the Trust Department at that time. There was no separate bank account for the Trust Department at that time but one was established on
79 October 3, 1931. At that time the trust liabilities of the Trust Department were uninvested balances, cash on hand in the Trust Company's administrator, executor accounts, guardian accounts and trustee accounts, of approximately $49,679.17, which is the amount that was put in the Trust Department bank account. The $45,000.00 paid by the

City of Lincoln was carried on the Trust Company's books listed "Trust Certificates" but the cash was in the general bank account. The $45,000.00 paid by the City was never carried on the books of the Trust Department. It was carried on the general ledgers of the Trust Company labelled "Trust Certificates". He produces a book of the Trust Company called "Daily Statement Record" which is a summary or total of the items that are described in it. On the 13th or 14th line, the items "Trust certificates $64,025.64" appears, which includes the City's $45,000.00. The City's $45,000.00 was carried under that heading and in that account from the time it was paid to the Trust Company until the closing of the Trust Company. The items above it are ten or twelve Trust Department items such as "cash", P. C's, and trust funds undisbursed and trust funds."

In October of 1931, a separate bank account was opened for trust funds. Prior to that time all funds held by the Trust Company were kept in its general bank account. The $45,000.00 paid by the City was not transferred at that time to the Trust Department bank account because the Trust Company "did not have funds enough,—segregated." The $45,000.00 paid by the City in September 1928 was deposited in the general bank account of the Trust Company.

Q. What was the lowest balance in the bank account of the Trust Company thereafter up to June 15, 1932?

Mr. Boehmer: Object as calling for a conclusion of the witness, incompetent, irrelevant and immaterial, not binding on the trustee.

Mr. Stewart: Do you object to the competency of the witness?

Mr. Boehmer: No.

80 Q. Have you examined the records on that, Mr. Schlytern and do you have the records here in the court room? A. Yes, sir.

Q. Will you state from the records what is or was the lowest balance after that money was paid by the City up to June 15, 1932?

Mr. Boehmer: The trustee objects as calling for a conclusion of the witness, incompetent, irrelevant and immaterial, not binding on the trustee.

Overruled.

Exception.

A. That was up to June 15, 1932?
Q. That is right.
A. About May 13, 1932.
Q. What was the amount?
A. Actual cash on hand (probably intended for 'on deposit' instead of 'on hand') $7,875.97. In addition to that there was a debit balance due from the Lincoln Safe Deposit; of course that could not be considered cash.

The lowest balance after the Trust Company received the City's money up to June 15, 1932 of cash items including cash on hand was $5,193.45 on May 13, 1932 and cash on deposit $7875.97 on May 13, 1932. The majority of the cash items were "debits carried forward from day to day and not charged into the expense accounts, or some advancement to employees that were out on the road until they got their checks." They were items that actually represented cash to the Company.

On June 15, 1932 an account was set up on the Trust Department books designated as "segregated assets", which totalled approximately $44,982.46, which was funds taken from the general account of the Trust Company and transferred to the Trust Department of the Trust Company. This fund was to cover items of principal payments, interest and other payments that were received after April 7, 1932 when Mr. Richardson was made President. No special items of liability were set up against that fund when it was transferred to the Trust Department. Later on as disbursements were
81 made from that account such disbursements were charged as liabilities against the account. The funds taken from the general account of the Trust Company as aforesaid were deposited in the Trust Department bank account. The lowest balance in the Segregated Assets account from the time it was created until the Trust Company closed was $25,097.09 and was on the day it closed. This balance of $25,097.09 was turned over to the Receiver in Bankruptcy and then by the Receiver to the Trustee in Bankruptcy.

The lowest balance of cash and cash items and cash on deposit in banks in the general account of the Trust Company after June 14, 1932 was on July 8, 1932, which was cash in bank $628.63, cash items $1,599.00 which include $599.00 cash. This cash, cash items and cash on deposit passed to the Receiver in Bankruptcy and later to the Trustee in Bankruptcy of the Trust Company. In keeping records in the Trust Department it set up accounts of all liabilities in that department and at the time the Trust Company closed it had in its Trust Department exclusive of the Segregated Assets account, sufficient funds to take care of all of these liabilities,

but not including the City's claim. The City made a demand on the Trust Company for payment of the $45,000.00 to it on or about June 14, 1932. The Trust Company acted as executor and administrator of assets and as guardian but not as curator. It was not acting as assignee at the time it closed. It was acting as Receiver but did not have any liability as Receiver. It was also acting as Trustee by appointment of court and under wills at the time it was closed. Its liabilities as such Trustee were carried in the accounts of the Trust Department. It was not acting as depository of money in court at the time it was closed.

Cross-Examination.

At the time the City deposited this money with the Trust Company and thereafter there were other funds deposited and a like certificate issued. The highest balance in that account was $64,025.64 on August 9, 1930, which included
82 the City's money. The whole account was carried in the same manner in the general funds of the Trust Company and no part of it at any time was set over into the Trust Department. The funds in that account were never transferred to the bank account of the Trust Department. At the time the bank account was set up for the Trust Department the items that were transferred from the general account to the Trust Department account included only uninvested balances in administrator and executor accounts, guardian accounts, voluntary and testamentary trusts. An amount of money that would equal the balances that were due those estates was taken out of the general account of the Trust Company and deposited in a separate account entitled "Trust Department Account." That account did not include the money deposited by the City of Lincoln or others for which trust certificates were issued. They were never transferred and placed in the Trust Department account.

Exhibit 2 is a form of receipt that the Trust Company issued to a certain class of investors. Persons depositing money in the Trust Company were issued receipts in the form of Exhibit 2 entitled "Modern Investments" but the names, dates and amounts were filled in.

Mr. Boehmer: We offer in evidence Exhibit 2.

Mr. Stewart: Claimant objects as incompetent, irrelevant and immaterial.

Overruled.

Exception.

Exhibit 2 is as follows:

(Exhibit 2.)

"Class..... $.....

Lincoln Trust Company

Modern Investments

Lincoln, Nebraska, ... 192.....

I, ... of Lancaster County, Nebraska, hereby agree to purchase from Lincoln Trust Company, Modern Investment bonds in the sum of ..... to be paid in monthly payments of $..... each.

The conditions of this contract of sale are as follows: Lincoln Trust Company agrees to pay interest at the rate of 6% per annum on each payment, from the date thereof, until the investment bond has been selected by and delivered to me. It is understood that I may select at the market price on day of delivery any Government, industrial, railroad, municipal, or farm or city real estate loan bond which Lincoln Trust Company has on hand at the time. It is understood
83 and agreed that unless this contract is completed within one year from the date hereof, because of any delay caused by me, then and in that case interest on the several payments made shall be calculated at 5½% instead of 6%. And it is further understood and agreed that in the event of great need on my part, I may have this agreement cancelled, and Lincoln Trust Company agrees to repay the principal of my several payments theretofore made together with interest at the rate of 4% from the date of each to the date of cancellation.

Payments on this contract shall be made on the 15th of each month until completed.

.....
As purchaser of Investment Bonds.

Accepted:

.....
For Lincoln Trust Company."

The largest amount of Modern Investment accounts in the general fund of the Trust Company after September 26, 1928 up to the adjudication in bankruptcy was on September 25, 1928, $114,418.00. The amount of that account after September 26, 1928 was less than that amount. The fluctuation be-

tween September 26, 1928 and October 1, 1928 was only $600.00. The lowest amount in this account prior to bankruptcy was $28,592.05 on June 28, 1932. After that date no more money was paid out on those accounts. There were approximately three hundred such accounts at the highest peak. The money in the Modern Investment accounts was in the general fund and was never transferred to the Trust Department account nor was it ever carried in the Trust Department bank account.

Exhibit 3 is a blank form of agreement called "Eltelic Contract" that was entered into by the Trust Company with a certain class of depositors.

Mr. Boehmer: The objectors offer in evidence Exhibit No. 3.

Mr. Stewart: Claimant objects as incompetent, irrelevant and immaterial.

Overruled.

Exception.

Exhibit 3 is as follows:

84 (Exhibit 3.)

Eltelic Contract
with
Lincoln Trust Company

Memorandum of Agreement:

Entered into this ..... day of ....., 193.... between Lincoln Trust Company, a Nebraska Corporation of Lincoln, Nebraska, as party of the first part, and .... of ..... as party of the second part:

Witnesseth, that whereas said party of the second part is now carrying life insurance upon ..... life, as follows:

And, whereas said ..... policies, as above set out, aggregate ..... Dollars of Insurance, and the combined annual premiums are the sum of ..... Dollars.

Now, therefore, in consideration of the payment by said second party of the sum of ..... Dollars, receipt whereof is hereby acknowledged, and in further consideration of the covenants and payments hereinafter set out, the said Lincoln Trust Company, first party, hereby covenants and agrees, as follows:

1. To open on the books of said Trust Company an account in the name of said second party; to credit to said account the amount herein acknowledged as received from second party and all subsequent payments to be made by second party as hereinafter set out; and annually on the ..... day of ..... in each year hereafter during the life of this contract to credit to said account interest at the rate of ..... per cent on the daily balances to the credit of second party.

2. To pay upon the receipt of premium notices unto each of the Insurance Companies hereinbefore named, at their respective offices or to their duly appointed agents qualified to receive the same, the said premiums as heretofore set out, during the life of this contract, promptly as the same respectively shall fall due and to give instructions to the said Insurance Companies that receipts for the payments so made are to be sent to the insured.

3. To send upon written request statement to second party showing the amount of payment due and to also state the amount of credit balance belonging to second party.

In Consideration of the covenants and agreements of said first party, the Lincoln Trust Company, said second party, agrees:

1. To pay to the first party at its office at Lincoln, Nebraska, in good exchange or lawful money of the United States during the life of this contract and the life of said policies of insurance, the sum of ..... Dollars on the ..... day of each month thereafter, beginning in the month of ..... 193..... and thereafter on the ..... day of each month, the sum of ..... Dollars.

2. To turn over all premium notices or interest notices received by second party to the first party immediately upon their receipt by second party.

3. To give written notice to the first party whenever any policies are to be added to those enumerated in this agreement or whenever any policies are to be dropped from this contract, and immediately upon the addition of any policy to increase the monthly payments above agreed by the 1/12 the amount of the premium of any such added policy.

85 4. That an average credit balance of not less than $50.00 shall always be in the hands of first party over and above any premiums which first party may be obliged to pay for and on behalf of second party under the terms of this

contract and second party further agrees that in case his average credit balance shall at any time be less than $50.00 that he will pay to first party the sum of fifty cents per month as a service charge in connection with this contract.

It is hereby mutually agreed by and between the parties hereto that if the second party shall fail and neglect to make the payments hereinbefore set out at any time during the life of this contract, not having exercised the option hereinafter mentioned, then, in such event, first party shall have one of two options:

(a). If the balance to the credit of second party on the books of first party is sufficient to pay the next annual premium falling due, first party may pay such premium to the Insurance Company entitled to receive it, and charge the amount to the account of the second party notwithstanding his laches; or

(b). First party may, without paying such premium calculate interest up to the date current, close the account by mailing check or draft for the balance, if any, to the second party at ..... last known post-office address, declare the contract cancelled and be acquitted and released from further liability hereunder.

It is further hereby mutually agreed by and between the parties hereto that whenever the interest accumulation or gain, if any, through dividends from participating policies, over payments, or other gain or credit, to the credit of second party on the books of first party, shall equal or exceed the sum of more monthly payments to be made by second party to first party, in such event, second party shall have the option to have such balance of interest or over payments or dividend accumulation or other gain, applied to the payment of further premiums in lieu of the one or more monthly payments such balance equals or exceeds; but second party shall give notice of ..... desire to exercise such option, in writing, to first party, stating the particular monthly payment or payments to be substituted by such balance.

It is further mutually agreed by and between the parties hereto that in the event of the death of second party at any time during the life of this contract, first party shall pay over to the executor or administrator or the estate of second party any balance found due to second party on the books of first party, and this contract shall cease and be at an end.

It is further mutually agreed by and between the parties hereto that either party shall have the option to terminate

this agreement by giving the other party written notice of ..... or its intention so to do, and first party shall calculate interest as aforesaid to the date of such proposed termination, pay over to second party the balance, if any, found due, by mailing check or draft for such amount, if any, to the last known postoffice address of second party and this contract shall cease and terminate and both parties shall be released and acquitted from any further liability hereunder.

In testimony whereof the parties hereto have set their hands as of the day and year first above written.

LINCOLN TRUST COMPANY,
By.....
First Party.

.....
Second Party.

Witnesses
.....
.....

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86 On September 26, 1928, there was approximately $36,516.76 in such accounts, which was the "peak". There was still some money in that account at the date of the adjudication in bankruptcy. The lowest amount in that account due the investors was $18,910.25 on June 28, 1932. In both the Eltelic and Modern Investment accounts the amount fluctuated from month to month. Some made deposits and others withdrew. The Eltelic account was kept in the general bank account and was never transferred to the Trust Department account.

The Trust Company also had "so-called investment accounts" which were receipts issued for money left there by individuals to be invested in the purchase of securities. The highest balance in this account was $95,484.32 on August 24, 1931. That account fluctuated from day to day and from month to month. The lowest amount in that account was $65,048.91 on June 28, 1932. Some money was paid out after that date up to July 8th and nothing was put in but he does not have the balance. The money in this account was kept in the general funds of the Trust Company and was never transferred to the Trust Department account. The general account was the one in which the Trust Compay kept all their own money and the other accounts testified to and out of this account the Trust Company paid its expenses, cost of operation of business and "any other items that came up".

Q. Now were there any other items of principal or interest that was paid into that account by borrowers of money or mortgagors? A. Yes, sir.

Q. Who were paying to the Lincoln Trust Company as trustee for bondholders and investors?

Mr. Stewart: Claimant objects as incompetent, irrelevant and immaterial, no proper and sufficient foundation laid, calling for a conclusion of the witness.

Overruled.

Exception.

A. It was.
Q. Isn't it a fact that was the account of all those moneys that were paid and deposited, that is money paid by borrowers on principal and also on interest?
87 A. Yes, sir.

Other items of money that would be deposited in the general account were rentals and insurance premiums, payments on collateral notes, commission notes and safety deposit box rentals. The moneys and profits due the Trust Company were put in that account and were co-mingled with the amount paid in to be applied on principal and interest due to investors and with the money deposited under the Modern Investment accounts, Eltelic accounts, investment accounts and with the money paid in by the City of Lincoln and with the funds belonging to the Trust Company itself. These funds were in no way related to the funds segregated or deposited in the Trust Department account. The funds segregated and placed in the Trust Department account on June 15, 1932 was $44,982.46.

Q. And do you know what the purpose of that segregation was? A. Yes, sir.
Q. You may state?

Mr. Stewart: Claimant objects as incompetent, irrelevant and immaterial, no proper and sufficient foundation laid.

Overruled.

Exception.

A. I cannot itemize, just generally, principal of the amount, was to take care of all payments on loans both principal and income, and Eltelic payments that came in after Mr. Richardson was made president.

Between April 7th and June 15, 1932, certain persons owing money to the Lincoln Trust Company as borrowers or mortgagors paid in certain amounts to be applied on the principal and interest of their indebtedness and others paid in money on Eltelic accounts to be paid as insurance premiums.

Q. And the amount of those payments were kept track of and the amounts that were paid, they were kept track of were they, and the amounts loaned to the trust company, is that correct?

Mr. Stewart: Claimant objects as incompetent, irrelevant and immaterial.

Overruled.

Exception.

A. They were.

88 Q. Then on the 15th day of June, 1932, a sum of money equal to the payments made on principal and interest by the borrowers and the amounts paid on these Eltelic contracts subsequent to April 7th, and prior to June 15 was segregated and placed in the trust department, is that correct?

Mr. Stewart: Object as no proper or sufficient foundation laid, incompetent, irrelevant and immaterial.

Overruled.

Exception.

A. That is right.

Q. And was any amount included in that sum to cover the amount of the deposit made by the City of Lincoln?

A. No, sir.

Q. Do you have your books here showing the matters that you have just testified to, to any extent?

A. I have the account showing the original at the time when it was set up on our books, and the payments made since that date up to the date of bankruptcy.

Q. And the payments were made out of that account after the 15th of June, 1932, and the date of the bankruptcy, were they?

A. Yes, sir.

Q. And they were paid out for the specific purposes for which that account was set aside, is that right?

A. Yes, sir.

Nothing was paid out of that account to any persons on the Modern Investments or other general investments made by

people to buy securities. That money was put in the Trust Department account and after the adjudication in bankruptcy the balance in the segregated account was paid to the Receiver but it is still in the Trust Department.

The cash items on July 8, 1932 included currency in the cashier's cage "and the checks and debit tickets were not run in the day's business". In the cash items was a debit ticket of $1,000.00 to be charged to the expense account.

Q. And that was not in fact cash, and there is nothing to show it was ever collected afterwards as cash?

89 Mr. Stewart: Claimant objects as incompetent, irrelevant and immaterial.

Overruled.

Exception.

A. No, sir.

The actual cash in the bank on July 8, 1932 was $628.63 and that is the amount that was turned over to the Receiver at the time of the adjudication in bankruptcy. On that date the funds in the Trust Department account was $42,443.91.

The general account of the Trust Company fluctuated from day to day as deposits were made and amounts withdrawn from prior to the time the City deposited its money up to the date of bankruptcy. The daily deposits around October 30, 1928 varied from $5000.00 to $50,000.00.

Redirect Examination.

The balance in the Trust Certificate account was $64,000.00 on August 9, 1930. It then went down to $51,000.00 about August, 1930, and then went down to $46,000.00 on January 30, 1931. It then dropped off slightly until at the time the Trust Company closed it was $45,125.65.

The Eltelic and Modern Investment liabilities of the Trust Company were carried on its books in its general account. The Investment account was $95,000.00 on August 24, 1931, which was the highest amount. An ordinary form of receipt was issued by the Trust Company to the persons paying in money to the Trust Company for its Investment account. The person paying in the money would receive a receipt in substance:

"Received of John Jones, One Hundred ($100.00) Dollars.

(Signed) LINCOLN TRUST COMPANY."

After the segregated assets account was set up, money was received and credited to that account. Interest and principal payments received by the Trust Company were credited to that account and then paid out through that account. He did not have any record at the hearing showing the amount of principal and interest paid in between April 7th and June 15, 1932, only the total figure already given. A person might have paid interest to the Trust Company
90 on April 8, 1932 and the Trust Company had not disbursed it to the interest coupon holder but paid it into its general account. Then sometime later, the Trust Company took out some money from the general account to take care of items of that character. As interest payments and principal payments came in they were placed in the Segregated Assets account and then disbursed from that account up to June 1st, when a Trust Company general account was opened with the Continental National Bank and the coupon payments were deposited there.

Q. That money that was put up in the segregated assets account was intended to cover any liabilities of a trust nature, wasn't it?

Mr. Boehmer: The Trustee objects as cross-examination of his own witness, no foundation laid, calling for a conclusion of the witness.

Q. Is that true, Mr. Schlytern?
A. Yes, sir.

Recross Examination.

Q. When you say that that was put up to pay trust accounts you don't mean it was put in to pay any liabilities of the trust department to the Trust Company?
A. No, sir.
Q. Will you state what you mean?
A. As trustee for bondholders.

The coupon payments received June 1st and 15th were deposited with the Continental National Bank and the customers were sent to the bank to collect the coupon payments. Nothing was taken from the segregated assets account and deposited with the Continental National Bank.

91 Redirect Examination.

The money put in the segregated assets account was not intended to cover liability for money paid in by Modern Investment investors. It was intended to cover Eltelic payments.

No further evidence was introduced by any of the parties at said hearing.

On February 21, 1934, the following stipulation was offered and received in evidence.

(Stipulation of Facts.)

"It is hereby stipulated and agreed by and between L. A. Ricketts, Trustee in Bankruptcy of Lincoln Trust Company, City of Lincoln, Nebraska and Standard Accident Insurance Company, that the following is a correct statement of facts and the truth of such facts is hereby admitted by the parties hereto and shall be accepted as true in connection with the amended claim of City of Lincoln, Nebraska and its motion to reconsider and set aside the allowance of said claim as a general claim and to allow such claim as a prior claim.

1. On September 26, 1928 Lincoln Trust Company as principal and said Insurance Company as surety executed and delivered to said City a bond wherein it was agreed the sum of Forty-Five Thousand and no/100 ($45,000.00) Dollars then paid by said City to said Trust Company should be repaid to said City upon its demand. On or about June 15, 1932, said City demanded the repayment of said sum from said Trust Company, which said Trust Company failed to repay. Said City of Lincoln is a municipal corporation of the State of Nebraska, governed under a home rule charter.

2. On December 12, 1932, said City and said Insurance Company entered into an agreement whereby said Insurance Company agreed to pay and did pay said City the sum of $45,276.81 in satisfaction of its liability on the aforesaid bond and said City in consideration thereof agreed to assign to said Insurance Company the certificates in the amount of $45,000.00 delivered by said Trust Company to said City when the aforesaid payment was made by said City to said Trust Company and said City further agreed to and did assign to said Insurance Company all its rights arising out of the payment of said $45,000.00 to it by said Trust Company, a bankrupt, in the sum of $45,000.00 with interest. L. A. Ricketts, Trustee in Bankruptcy of said Trust Company had knowledge of the foregoing settlement on December 12, 1932.

3. In the event only that the foregoing facts are received in evidence by the Referee, it is further stipulated and agreed that by reason of the facts heretofore set forth in this stipulation, said Insurance Company is the assignee of the claim and amended claim of said City of Lincoln against the above named bankrupt in the sum of $45,000.00 and said City of

Lincoln assigned all of its rights against said bankrupt to said Insurance Company, and said Insurance Company should be made a party to the proceedings relating to the allowance of said amended claim, and the parties hereto consent that an order be entered by the Referee designating said Insurance Company as assignee of said claim and amended claim and making it a party to the foregoing proceedings.

4. It is further stipulated and agreed that all of the parties hereto reserve the right to object to any of the matters of fact herein stipulated on the ground of immateriality thereof."

(Approval of Statement of Evidence by Counsel.)

The above and foregoing is all the evidence introduced at the aforesaid hearings before the Referee and at the
92 aforesaid hearing before this court.

Wherefore, appellants pray that the above statement of evidence be settled, approved and allowed by the above entitled court as a true and correct statement of all of the evidence received at the aforesaid hearings, for use on the appeal taken to the Circuit Court of Appeals for the Eighth Circuit.

Dated December 26, 1934.

DON W. STEWART,
A. A. WHITWORTH,
C. B. PAINE,
Attorneys for Appellants.

Approval of Statement of Evidence by Appellee and Waiver.

The foregoing statement is agreed to as a correct statement under paragraph b of Equity Rule 75 and the lodgment thereof in the Clerk's office for the examination of the appellee and notice of such lodgment and of the time when same will be presented to the Judge for approval, are hereby waived and the same may be approved by the Judge at once.

Dated December 26, 1934.

L. A. RICKETTS,
Trustee in Bankruptcy of Lincoln Trust Company, Bankrupt,
By R. A. Boehmer,
His Attorney.

Approval of Statement of Evidence by Judge.

On this 29th day of December, 1934, the foregoing statement having been presented to me, the same is hereby [and] all things allowed and approved and the same is hereby ordered filed as a "Statement of the Evidence" to be included in the record of appeal in the above styled and numbered cause as provided in Paragraph b of Equity Rule 75.

J. A. DONOHOE,
District Judge.

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93 (Additional Transcript on Cross-Appeal of L. A. Ricketts, Trustee.)

In the District Court of the United States for the District of Nebraska, Lincoln Division.

In the Matter of

Lincoln Trust Company, Bankrupt.

In Re Claim of City of Lincoln.

No. 2314. In Bankruptcy.

Pleas before Honorable J. A. Donohoe, Judge of the District Court of the United States, in and for the District of Nebraska, within the Eighth Judicial Circuit, at the October 1934 Term of said Lincoln Division, begun on the 4th day of October, 1934, and held, for the Court's convenience, at the United States Court House in the City of Omaha within the Omaha Division of the District of Nebraska.

Appearances.

For Appellant:

R. A. Boehmer, 126 South 11th Street, Lincoln Nebraska.
Perry W. Morton, 126 South 11th Street, Lincoln, Nebraska.

For Appellee:

Stewart, Stewart and Whitworth, 1412 Sharp Building, Lincoln Nebraska.

Be It Remembered, That at a District Court of the United States for the District of Nebraska, Lincoln Division, held at the United States Court House in the City of Omaha, in the Omaha Division, for the convenience of the Court, at the October 1934 Term, there being present and presiding Honorable J. A. Donohoe, United States District Judge in and for the District of Nebraska, proceedings were had and done in the respective days hereinafter mentioned in the matter of

Claim of the City of Lincoln against L. A. Ricketts as Trustee of the Lincoln Trust Company, Bankrupt, that is to say:

94 Praecipe for Additional Transcript.

Filed at 10:15 A. M. Jan. 7, 1935.

To R. C. Hoyt, Clerk of said Court:

In preparing the transcript of the record on the appeal of the City of Lincoln, Nebraska and Standard Accident Insurance Company please incorporate therein the following additional portions of the record:

1. Petition for cross-appeal.

2. Assignment of errors on cross-appeal.

3. Order allowing cross-appeal.

4. Citation dated January 3, 1935 and admission of service.

5. Petition for cross-appeal to Circuit Court of Appeals, Eighth Circuit.

6. Assignment of errors on cross-appeal, filed in Circuit Court of Appeals, Eighth Circuit.

7. Waiver of notice of hearing on petition for cross-appeal to Circuit Court of Appeals, Eighth Circuit.

8. Order of Circuit Court of Appeals, Eighth Circuit, allowing cross-appeal.

9. Citation of Circuit Court of Appeals, Eighth Circuit, on cross-appeal and admission of service thereof.

10. This praecipe and admission of service thereon.

Signed this 7th day of January, 1935.

R. A. BOEHMER,
PERRY W. MORTON,
Attorneys for L. A. Ricketts, Trustee in Bankruptcy of Lincoln Trust Company.

We hereby acknowledge receipt of a copy of the foregoing praecipe, and accept service of the same this 7th day of January, 1935, and propose no additions thereto.

CITY OF LINCOLN and
STANDARD ACCIDENT INSURANCE COMPANY,
By Don W. Stewart,
A. A. Whitworth,
Charles B. Paine.

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95 (Petition of L. A. Ricketts, Trustee in Bankruptcy, etc., for Appeal.)

(Filed in U. S. District Court at 8:30 A. M. Jan. 3, 1935.)

To the Honorable J. A. Donohoe, Judge of said court:

Your petitioner, L. A. Ricketts, Trustee in Bankruptcy of the Lincoln Trust Company, who is the objector in the above entitled cause, respectfully shows that City of Lincoln, Nebraska and Standard Accident Insurance Company, its assignee, have been allowed an appeal from the judgment and decree made on the 17th day of December, 1934, in this cause, and your petitioner, the objecting trustee, also considered himself aggrieved by said judgment and decree, insofar as it allows priority in the payment of the claim of said City of Lincoln, Nebraska, and Standard Accident Insurance Company, its assignee, in the amount of $628.63, and therefore petitioner prays for the allowance of a cross appeal from said judgment and decree to the Circuit Court of Appeals of the United States, Eighth Circuit, for the reasons stated in the assignment of errors filed herewith.

Dated January 2, 1935.

L. A. RICKETTS,
Trustee in Bankruptcy of Lincoln Trust Company.
By R. A. Boehmer &
Perry W. Morton,
His Attorneys.

Cross-appeal allowed this 3rd day of January, 1935.

J. A. DONOHOE,
District Judge.

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96 (Assignment of Errors on Appeal of L. A. Ricketts, Trustee in Bankruptcy, etc.)

(Filed in U. S. District Court at 8:30 A. M. Jan. 3, 1935.)

Comes now L. A. Ricketts, Trustee in Bankruptcy, appellee in the above entitled cause, and files the following assignment of errors upon which he will rely in the prosecution of the appeal herewith petitioned for in said cause from the decree and judgment filed on December 17, 1934 in the District Court of the United States for the District of Nebraska, Lincoln Division:

1. The court erred in finding and holding that the claimant has, ever since the amendment to its claim was allowed, claimed that it was entitled to priority of a sovereign under the laws of Nebraska.

2. The court erred in finding and holding that the assets of the bankrupt which passed to the Trustee in Bankruptcy included $628.63 of the funds paid by said city to the Bankrupt.

3. The court erred in finding and holding that the Standard Accident Insurance Company became entitled to all the rights of said city under said amended claim.

4. The court erred in finding and holding that the sum of $45,000 paid by said city to the Lincoln Trust Company was to be held in trust for said city, and that it constituted a trust fund.

5. The court erred in modifying the order of the Referee and in allowing priority in the amount of $628.63 and in ordering said sum to be paid to said claimant prior to the claims of general creditors.

6. The court erred in not finding and holding that the funds deposited with said bankrupt did not constitute a trust fund.

97 7. The court erred in not finding and holding that the said claimant was not entitled to any priority over other creditors.

Wherefore, appellee and cross-appellant prays that the judgment and decree filed in the District Court of the United States for the District of Nebraska, Lincoln Division, on December 17, 1934, be modified by denying any priority to the claim of said City of Lincoln and Standard Accident Insurance Company in any sum whatsoever, and that said claim be

allowed as a general claim only, and for such other and further relief as to the court may seem just and proper.

Dated Jan. 2, 1935.

L. A. RICKETTS,
Trustee of Lincoln Trust Company, Bankrupt.
By R. A. Boehmer &
Perry W. Morton,
His Attorneys.

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98 (Citation on Appeal of L. A. Ricketts, Trustee in Bankruptcy, etc. and Acknowledgment of Service.)

(Filed in U. S. District Court at 10:15 A. M., Jan. 7, 1935.)

In the District Court of the United States, District of Nebraska, Lincoln Division.

In the Matter of
Lincoln Trust Company, Bankrupt.

Case #2314 In Bankruptcy.

In Re Claim of the City of Lincoln.

To City of Lincoln, Nebraska and Standard Accident Insurance Company and to Don W. Stewart, A. A. Whitworth, and C. B. Paine, their attorneys:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit at the city of St. Louis, Missouri forty (40) days from and after the day this citation bears date, pursuant to a cross-appeal filed in the Clerk's office of the District Court of the United States for the District of Nebraska, Lincoln Division wherein L. A. Ricketts, Trustee in Bankruptcy of Lincoln Trust Company, is appellee and cross-appellant, and City of Lincoln, Nebraska and Standard Accident Insurance Company are appellants and cross-appellees, to show cause, if any there be, why the order entered on December 17, 1934, in the respects mentioned in said cross-appeal should not be reversed, and why speedy justice should not be done the parties in that behalf.

Witness the Honorable Judges of the District Court of the United States for the District of Nebraska this 3rd day of January, 1935.

J. A. DONOHOE,
United States District Judge.

Service of the foregoing citation on cross-appeal acknowledged and accepted this 5th day of January, 1935.

DON W. STEWART,
A. A. WHITWORTH,
CHARLES B. PAINE,
Attorneys for Standard Accident Insurance Company and City of Lincoln.

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99 (Clerk's Certificate to Transcript.)

United States of America,
District of Nebraska,
Lincoln Division—ss:

I, R. C. Hoyt, Clerk of the District Court of the United States in and for the District of Nebraska, hereby certify that pursuant to orders allowing appeal and cross appeal, and in compliance with praecipe for Transcript on Appeal, a copy of which is found on page 3 hereof, and with praecipe for Transcript on Cross-Appeal, a copy of which is found on page 94 hereof; the foregoing record has been made, and that the same is a true and faithful transcript of the pleadings and proceedings on file and of record in said court, as indicated in the foregoing index, in the matter of the claim of The City of Lincoln, and of the Standard Accident Insurance Company against L. A. Ricketts as Trustee of the Lincoln Trust Company, Bankrupt, No. 2314 In Bankruptcy.

I further certify that copies of the Citation on Appeal and of the Citation on Cross-Appeal, duly certified, have been lodged and remain in my office as such clerk.

Seal
U. S. Dist. Court
Dist. of Nebraska
Lincoln Div.

Witness my hand and the Seal of Said Court at Lincoln, in said District this 8" day of January, 1935.

R. C. HOYT, Clerk,
By E. B. Panter,
Deputy Clerk.

Filed Jan. 10, 1935, E. E. Koch, Clerk.

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100 (Petition of City of Lincoln, et al., for Appeal Filed in U. S. Circuit Court of Appeals.)

United States Circuit Court of Appeals
Eighth Circuit.

In the Matter of
Lincoln Trust Company, Bankrupt.

Case No. 2314. In Bankruptcy.

In Re Claim of City of Lincoln.

To the Honorable the Judges of the Circuit Court of Appeals for the Eighth Circuit for the United States:

Your petitioners, City of Lincoln, Nebraska, and Standard Accident Insurance Company respectfully represent:

1. On September 29, 1928, the City of Lincoln, in the State of Nebraska, a municipal corporation and an agency of the State of Nebraska, paid to the Lincoln Trust Company $45,000.00 which was to be held in trust for said city. The money was placed by said trust company in its general bank account, thereby augmenting the general assets of said trust company and was carried on the books of the trust company under the heading of "Trust Certificates". On June 14, 1932, the city demanded repayment of said sum which was refused by the trust company and said trust company has paid no part thereof to said city.

2. Said trust company was adjudicated a bankrupt on July 9, 1932, and its assets then passed to the trustee in bankruptcy herein. A claim was duly filed by said city against the bankrupt for said $45,000.00 and thereafter said claim was duly amended to include a claim of priority in payment and said city has, ever since said amendment was allowed, claimed a priority in the payment of said $45,000.00 because it was a trust fund; entitling it to priority under the laws of the State of Nebraska, and because it was entitled to the priority of a sovereign under the laws of Nebraska. Subsequent to the hearing on the right of said city to priority the Standard Accident Insurance Company paid said city the amount of its amended claim and said
101 amended claim was then duly assigned to said insurance company and said insurance company then became entitled to all the rights of said city under said amended claim.

3. All of the foregoing facts were so found by Honorable J. A. Donohoe, Judge of the District Court of the

United States for the District of Nebraska, Lincoln Division, upon a hearing before him on the petition of your petitioners for a review of an order of D. H. McClenahan, Referee in Bankruptcy, disallowing the claim of your petitioners for priority in the payment of its amended claim. Said Judge first filed a memorandum opinion finding that your petitioners were entitled to the right of priority accorded a sovereign in the payment of said amended claim under the rule announced by this court in City and County of Denver vs. Stenger, 295 Fed. 808, and that petitioners had traced into the hands of the Trustee in Bankruptcy $12,979. of the funds previously paid by the City to said Trust Company. Thereafter, said Judge entered an order withdrawing the aforesaid memorandum opinion and filed another memorandum opinion in which he held petitioners were not entitled to the right of priority accorded a sovereign and finding that petitioners had traced only $628.63 into the hands of the Trustee in Bankruptcy of the amount paid by said City to said Trust Company. Thereafter on December 17, 1934, said Judge filed findings of fact as above set forth and conclusions of law that said City of Lincoln was entitled to the payment of $628.63 of said amended claim prior to the payment of claims of general creditors and that petitioner Standard Accident Insurance Company as assignee of said amended claim became entitled to all the rights of said City under said amended claim. On the same day said Judge entered a judgment and decree in accordance with said conclusions of law and allowing exceptions to all parties.

4. Said conclusions of law, judgment and decree are erroneous for the reasons specified in the assignment of errors which is filed herewith, which may be summarized as follows:

102 a. Said City of Lincoln, as an agency of the State of Nebraska, is entitled to priority accorded a sovereign under the common law, which by express Nebraska statute, is made a part of the law of Nebraska. Said statute is Section 49-101 of the Compiled Statutes of Nebraska for 1929 and provides:

"Common law in Force. So much of the common law of England as is applicable and not inconsistent with the constitution of the United States, with the organic law of this state, or with any law passed or to be passed by the legislature of this state, is adopted and declared to be law

within the State of Nebraska. (R. S. p. 31; Ann. 6955; Comp. 1934; R. S. 1913, 3697; C. S. 1922 3085)"

b. Said City of Lincoln, aside from its rights as a sovereign, is entitled to priority because Section 64 b of the Bankruptcy Act, 11 U. S. C. A., Section 104 b, specifically provides that a claimant having priority under a state law, shall also have priority under the bankruptcy law and under the common law which by the Nebraska statute quoted above is adopted as a part of its law, trust funds are entitled to priority if they have augmented the assets of the Trustee. Said Section 64 b provides in part as follows:

"The debts to have priority in advance of the payment of dividends to creditors and to be paid in full out of the bankrupt estates and the order of payment shall be * * * (7) debts owing to any person who by the laws of the states and the United States is entitled to priority."

c. In the absence of a right to priority under the rules given above said City of Lincoln would be entitled to priority under the Federal rule for at least the lowest balance of cash, cash items and bank deposits prior to bankruptcy, which was $13,069.42, instead of $628.63.

d. Said City of Lincoln is entitled to payment from securities deposited with the State of Nebraska by said Trust Company for the specific purpose of taking care of its trust obligations.

5. Petitioners further show to the court that an appeal has been allowed from the aforesaid judgment and decree by the District Court of the United States for the District of Nebraska, Lincoln Division, but in order to make certain that an appeal is properly allowed and presented to this court, the petitioners desire this court to also allow an appeal. Petitioners further show that unnecessary confusion and expense may be avoided without affecting the rights of the parties by permitting the transcript of the record of the appeal allowed by this court to be treated and considered as the transcript of the record in the appeal allowed by the District Court in this proceeding.

Wherefore, your petitioners, feeling aggrieved because of such judgment and decree filed on December 17, 1934, in the above entitled proceeding do hereby pray that
103 this court grant them leave to appeal said judgment and decree to the United States Circuit Court of Appeals for the Eighth Circuit and pray that this appeal may

be allowed and that a citation may be granted and directed to L. A. Ricketts, Trustee of the above named bankrupt estate, commanding him to appear before this court and that a transcript of the record and evidence in said proceeding duly authenticated may be transmitted to this court.

Petitioners further pray that the transcript of the record of the appeal allowed by this court be treated and considered as the transcript of the record in the appeal allowed by the District Court in this proceeding.

CITY OF LINCOLN, NEBRASKA,
and
STANDARD ACCIDENT INSURANCE COMPANY, Petitioners,
By Don W. Stewart,
A. A. Whitworth,
C. B. Paine, Their Attorneys.

United States of America,
District of Nebraska,
Lancaster County—ss.

Don W. Stewart, being first duly sworn upon his oath, deposes and says that he is one of the attorneys for the above named petitioners; that petitioners are each corporations; that he is acquainted with the matters and facts set forth in the foregoing petition and that the same are true as he verily believes and that the appeal therein prayed for is not intended for delay but that he verily believes that injustice has been done.

DON W. STEWART.

Subscribed and sworn to before me this 28 day of December, 1934.

CHARLES B. PAINE,
(Notarial Seal) Notary Public.

(Endorsed): No. 10,213. Petition for Appeal. Filed in U. S. Circuit Court of Appeals on Dec. 29, 1934, E. E. Koch, Clerk.

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104 (Assignment of Errors on Appeal of City of Lincoln, et al., Filed in U. S. Circuit Court of Appeals.)

United States Circuit Court of Appeals
Eighth Circuit.

In the Matter of
Lincoln Trust Company, Bankrupt.
Case No. 2314. In Bankruptcy.
In Re Claim of City of Lincoln.

Come now the appellants in the above entitled cause and file the following assignment of errors upon which they will rely in the prosecution of the appeal herewith petitioned for in said cause from the decree filed on December 17, 1934, in the District Court of the United States for the District of Nebraska, Lincoln Division.

1. The court erred in holding that the City of Lincoln's amended claim was not entitled to the priority accorded a sovereign at common law, which by Nebraska Statute is made a part of the Nebraska law.

2. The court erred in holding that the amended claim was not entitled to priority for the full amount as a trust fund under the laws of the State of Nebraska.

3. The court erred in holding that only $628.63 of the funds paid by the City of Lincoln to the bankrupt were traced into the hands of the Trustee in Bankruptcy.

4. The court erred in holding the amended claim was not entitled to payment from securities deposited with the Department of Trade and Commerce of the State of Nebraska.

5. The court erred in holding cash and cash items should not be included with cash in the bank account in determining the amount of the funds paid by the City of Lincoln to the bankrupt, which passed to the Trustee in Bankruptcy.

6. The court erred in holding the opinion of a Supreme Court Commissioner of the State of Nebraska should be considered as establishing the rule that the common law right of a sovereign to priority in payment of its claim is not a part of the law of Nebraska.

7. The court erred in sustaining the finding of the
105 Referee that the common law right of a sovereign to priority in the payment of its claim is not a part of the law of Nebraska.

8. The court erred in sustaining the finding of the Referee that the amended claim was not entitled to priority for the full amount as a trust fund under the laws of the State of Nebraska.

9. The court erred in sustaining the finding of the Referee that the amended claim was not entitled to payment from securities deposited with the Department of Trade and Commerce of the State of Nebraska.

10. The court erred in holding that a municipal corporation is not within the provisions of subdivision 7 of Section

64-b as amended, of the Bankruptcy Act (U. S. C. A. Title 11, Section 104-b (7)) allowing priority to "debts owing to any person who by the laws of the State and the United States is entitled to priority."

11. The court erred in refusing to direct the payment of the entire amended claim prior to the payment of claims of general creditors.

Wherefore, appellants pray that the judgment and decree filed in the District Court of the United States for the District of Nebraska, Lincoln Division on December 17, 1934, be modified by directing the payment in full of the amended claim of appellants prior to the payment of the claims of general creditors and for such other and further relief as to the court may seem just and proper.

Dated December 28, 1934.

CITY OF LINCOLN, NEBRASKA,
and
STANDARD ACCIDENT INSURANCE COMPANY, Appellants,
By Don W. Stewart,
A. A. Whitworth,
C. B. Paine, Their Attorneys.

106 United States of America,
State of Nebraska,
Lancaster County—ss.

Don W. Stewart, being first duly sworn upon his oath, deposes and says that he is attorney for the appellants; that appellants are each corporations and for that reason he makes this verification; that he has read over the foregoing assignments of error, knows the contents thereof and that the facts therein stated are true as he verily believes.

DON W. STEWART.

Subscribed and sworn to before me this 28th day of December, 1934.

CHARLES B. PAINE,
Notary Public.

(Notarial Seal)

(Endorsed): No. 10,213. Assignment of Errors. Filed in U. S. Circuit Court of Appeals on Dec. 29, 1934. E. E. Koch, Clerk.

107 (Waiver of Notice of Hearing of Petition for Appeal of City of Lincoln, et al.)

Receipt is hereby acknowledged of a copy of petition for appeal and assignment of errors to be filed in the above entitled court and relating to the decree filed in the District Court of United States for the District of Nebraska Lincoln Division on December 17, 1934, and the undersigned hereby waives notice of hearing on said petition and consents to the immediate hearing of said petition for appeal.

Signed December 27, 1934.

L. A. RICKETTS,
Trustee in Bankruptcy of
Lincoln Trust Company,
Bankrupt,
By R. A. Boehmer,
His Attorney of Record.

(Endorsed): No. 10,213. Waiver of Notice of Hearing on Petition for Appeal. Filed in U. S. Circuit Court of Appeals on Dec. 29, 1934, E. E. Koch, Clerk.

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108 (Order of U. S. Circuit Court of Appeals Allowing Appeal to City of Lincoln, et al.)

United States Circuit Court of Appeals, Eighth Circuit.

November Term, 1934.

Monday, December 31, 1934.

City of Lincoln, Nebraska, and Standard Accident Insurance Company, Appellants,
No. 10213. vs.
L. A. Ricketts, as Trustee in Bankruptcy of Lincoln Trust Company, Bankrupt.

Appeal from the District Court of the United States for the District of Nebraska.

In the Matter of
Lincoln Trust Company, Bankrupt.

In the Matter of the Lincoln Trust Company in the District Court of the United States for the District of Nebraska, Lincoln Division, the City of Lincoln and Standard Accident Insurance Company has filed petition for appeal from judgment

and decree entered by said District Court on December 17, 1934, and also their assignment of errors and a waiver by counsel for appellee of the hearing of said petition for appeal. The said matters having been considered, It is now here ordered by this Court that the appeal prayed for be, and the same is hereby, allowed, the appellant to file with the Clerk of this Court on or before January 10, 1935, a bond for costs in the sum of Two Hundred Fifty ($250.00) Dollars, with good and sufficient security, said bond to be approved by this Court or one of the Judges thereof.

It is further ordered by this Court that the transcript of the record to be filed on the appeal allowed by said District Court be also treated and considered as a transcript of the record on the appeal allowed hereby.

December 31, 1934.

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109 (Citation on Appeal Allowed to City of Lincoln, et al., by U. S. Circuit Court of Appeals.)

United States Circuit Court of Appeals, Eighth Circuit.

City of Lincoln, Nebraska, and Standard Accident Insurance Company, Appellants,
No. 10213. vs.
L. A. Ricketts, as Trustee in Bankruptcy of Lincoln Trust Company, Bankrupt.

Appeal from the District Court of the United States for the District of Nebraska.

In the Matter of
Lincoln Trust Company, Bankrupt.

United States of America,

To L. A. Ricketts, as Trustee in Bankruptcy of Lincoln Trust Company, Bankrupt:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, forty days from and after the date this citation bears date, pursuant to appeal allowed by said Court, wherein the City of Lincoln, Nebraska, and Standard Accident Insurance Company are Appellants and you are appellee, to show cause, if any there be, why the judgment and decree of the District Court of the United States for the District of Nebraska, Lincoln Division, entered December 17, 1934, as in said appeal mentioned,

should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness the Honorable Kimbrough Stone, Senior United States Circuit Judge, this 31st day of December, A. D., 1934.

KIMBROUGH STONE,
Senior United States Circuit Judge,
Eighth Circuit.

Comes Now L. A. Ricketts, as Trustee in Bankruptcy of Lincoln Trust Company, Bankrupt, appellee, and hereby accepts service of the foregoing citation on appeal in the above cause and does hereby enter his appearance in the Circuit Court of Appeals of the Eighth Circuit.

Dated January 2, 1935.

L. A. RICKETTS,
As Trustee in Bankruptcy of Lincoln Trust Company, Bankrupt,
By R. A. Boehmer, &
Perry W. Morton,
His Attorneys of Record.

(Endorsed): No. 10,213. Citation on Appeal allowed by U. S. Circuit Court of Appeals. Filed in U. S. Circuit Court of Appeals on Jan. 5, 1935, E. E. Koch, Clerk.

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110 (Bond on Appeal Allowed to City of Lincoln, et al., by U. S. Circuit Court of Appeals.)

Know All Men By These Presents:

That the Standard Accident Insurance Company of Lincoln, Nebraska, and City of Lincoln, as principals, and Globe Indemnity Company, New York, N. Y., as surety, are held and firmly bound unto L. A. Ricketts, as Trustee in Bankruptcy of the Lincoln Trust Company, in the sum of Two Hundred Fifty Dollars ($250.00) to be paid to said L. A. Ricketts, as Trustee in Bankruptcy of Lincoln Trust Company, Bankrupt, its successors and assigns, for which payment well and truly to be made we bind ourselves, our successors and assigns jointly and severally by these presents.

Dated this 7th day of January, 1935.

Whereas, a judgment and decree was rendered by the District Court of the United States for the District of Nebraska

Lincoln Division, in the above entitled proceedings on December 17, 1934, from which said persons have petitioned for and have been allowed an appeal by the Circuit Court of Appeals, Eighth Circuit to the said Circuit Court of Appeals, Eighth Circuit,

Now, Therefore, the condition of the above obligation is that if said appellants shall prosecute their appeal to effect and without delay and answer for all damages and costs if said decree be affirmed, then the above obligation to be void; otherwise to remain in full force and effect.

STANDARD ACCIDENT INSURANCE COMPANY, and CITY OF LINCOLN, Principals,
By Don W. Stewart, Their Attorney.

GLOBE INDEMNITY COMPANY,
Surety.
By Merle C. Rathburn. (Seal)

110a

Power of Attorney
From
Globe Indemnity Company

Newark, New Jersey

Know All Men By These Presents, That the Globe Indemnity Company, a New York Corporation, having its principal office in the City of Newark, County of Essex, State of New Jersey, pursuant to the following By-Law, which was adopted by the Directors of the said Company on January 15, 1919, to-wit:

"Article XI, Section 1.—The President, any Vice-President or the General Manager, shall have power and authority to appoint resident Vice-Presidents, resident Assistant Secretaries and Attorneys-in-fact, and to authorize them to execute on behalf of the Company and attach the seal of the Company thereto, bonds and undertakings, recognizances, contracts of indemnity and other writings obligatory in the nature thereof."

does hereby nominate, constitute and appoint George W. Holmes, S. C. Waugh, Merle C. Rathburn and C. E. Hinds, all of Lincoln, Nebraska, its true and lawful agents and attorneys-in-fact, to make, execute, seal and deliver for and on its behalf, and as its act and deed, any and all bonds and undertakings in its business of guaranteeing the fidelity of persons holding places of public or private trust and guaranteeing the performance of contracts (other than insurance

policies) and all bonds or other undertakings required or permitted in all actions or proceedings or by law required or permitted.

All Such bonds and undertakings as aforesaid to be signed for the Company and the Seal of the Company attached thereto by any two of the said George W. Holmes, S. C. Waugh Merle C. Rathburn or C. E. Hinds.

And Also any and all such bonds and undertakings as aforesaid in penalties not exceeding ($100,000.00) One Hundred Thousand Dollars each, may be signed for the Company and the Seal of the Company attached thereto by any one of the said George W. Holmes, S. C. Waugh, Merle C. Rathburn or C. E. Hinds, individually.

And the execution of such bonds or undertakings in pursuance of these presents, shall be as binding upon said Company as fully and amply, to all intents and purposes, as if they were duly executed by the regularly elected officers of said Company.

In Witness Whereof, the Globe Indemnity Company has caused these presents to be signed by its Vice-President, and its corporate seal to be hereto affixed this 20th day of June, 1927.

(Corporate Seal) (Signed) M. A. CRAIG,
Vice-President.

State of New Jersey,
County of Essex—ss.

On this 20th day of June, A. D. 1927 before the subscriber, a Notary Public of the State of New Jersey, duly commissioned and qualified, came M. A. Craig, Vice-President of the Globe Indemnity Company, to me personally known to be the individual and officer described in, and who executed the preceding instrument, and he acknowledged the execution of the same, and being by me duly sworn, deposed and said, that he is the officer of said Company aforesaid, and that the seal affixed to the preceding instrument is the Corporate Seal of said Company, and the said Corporate Seal and his signature as officer were duly affixed and subscribed to the said instrument by the authority and direction of the said Corporation, and that Article XI, Section 1, of the By-Laws of said Company, referred to in the preceding instrument is now in force.

In Testimony Whereof, I have hereunto set my hand and affixed my Official Seal at the City of Newark the day and year first above written.

(Notarial Seal) (Signed) C. H. MILLIGAN,
Notary Public, State of New Jersey.

My Commission Expires Nov. 9, 1930.

110b I, the undersigned, assistant secretary of the Globe Indemnity Company, a New York Corporation, do hereby certify that the original Power Of Attorney, of which the foregoing on the reverse side hereof is a full, true and correct copy, remains in full force and effect and has not been revoked.

In Witness Whereof, I have hereunto set my hand and affixed the corporate seal of said Company at the City of New York this

Subscribed and sworn to before me this Jan. 7, 1935.

(Corporate Seal) OSCAR C. KENZE,
Assistant Secretary.

The foregoing bond and surety thereon hereby approved.

January 10, 1935.

KIMBROUGH STONE,
Judge, Circuit Court of Appeals,
Eighth Circuit.

(Endorsed): No. 10,213. Bond on Appeal with Approval of Judge Stone. Filed in U. S. Circuit Court of Appeals on Jan. 10, 1935, E. E. Koch, Clerk.

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111 (Petition of L. A. Ricketts, Trustee, for Appeal, Filed in U. S. Circuit Court of Appeals.)

United States Circuit Court of Appeals
Eighth Circuit.

In the Matter of

Lincoln Trust Company, Bankrupt.

Case #2314. In Bankruptcy.

In Re Claim of the City of Lincoln and Standard Accident Insurance Company.

To the Honorable Judges of the United States Circuit Court of Appeals, Eighth Circuit:

Your petitioner, L. A. Ricketts, Trustee in Bankruptcy of Lincoln Trust Company, who is the objector in the above entitled cause, respectfully represents that City of Lincoln, Nebraska, and Standard Accident Insurance Company, its assignee, have been allowed by this court an appeal from a certain judgment and decree made in the above entitled cause on December 17, 1934, by the District Court of the United States for the District of Nebraska, Lincoln Division. Your petitioner, the objecting trustee, also considers himself aggrieved by said judgment and decree insofar as it allows priority in the payment of the claim of said City of Lincoln, Nebraska, and Standard Accident Insurance Company, its assignee, in the amount of $628.63, and your petitioner prays this Honorable Court to allow him a cross-appeal from said judgment and decree for the reasons stated in the assignment of errors filed herewith.

Petitioner further shows that in addition to the appeal allowed as aforesaid to the City of Lincoln, Nebraska, and Standard Accident Insurance Company by this court, and in addition to the cross-appeal herewith petitioned for, said City of Lincoln and Standard Accident Insurance Company have also been allowed an appeal from the same judgment by the District Court of the United States for the District of Nebraska, Lincoln Division, and your petitioner has also been allowed a cross-appeal by said District Court; so that from the same judgment and decree there will be the two companion appeals of the said claimant and the two companion cross-appeals of this petitioner. Petitioner prays that the transcript of the record to be filed on the appeal allowed to said City of Lincoln, Nebraska, and Standard Accident Insurance Company by said District Court be treated and considered as a transcript of the record on all
112 appeals and cross-appeals taken from said judgment and decree, including the cross-appeal herewith petitioned for, and that the briefs of the parties to be filed on the said appeal allowed to said City of Lincoln and Standard Accident Insurance Company by said District Court may be treated and considered as the briefs of the parties on all of said appeals and cross-appeals.

Dated January 4, 1935.

L. A. RICKETTS,
Trustee in Bankruptcy of
Lincoln Trust Company,
By R. A. Boehmer &
Perry W. Morton,
His Attorneys.

113 Statement of Case.

For the information of the court in considering the petition for cross-appeal this day filed by the undersigned, L. A. Ricketts, Trustee in Bankruptcy of Lincoln Trust Company, this brief statement of the case is respectfully tendered with said petition.

A claim was filed in the matter of Lincoln Trust Company, bankrupt, for the sum of $45,000, representing money which the City of Lincoln paid to said bankrupt, and for which it received what were known as trust certificates, each of which certificates recited in part that bankrupt "holds for investment in Trust, funds belonging to City Treasurer of Lincoln, Nebraska," a stated sum "with interest at three per cent per annum" • • • etc.

There is no dispute as to the amount, nor the validity of the claim, as a general claim, but the trustee filed objections to the allowance of priority to said claim and upon the hearing the Referee denied any priority to the claimant, and allowed the claim as a general claim for the full amount.

Upon review, petitioned for by claimant, the court below entered its judgment and decree, modifying the Referee's order to the extent of allowing priority of payment in the sum of $628.63 and allowing the balance as a general claim. It is on account of the allowance of any priority whatever that this cross-appeal is prayed for. It is the contention of the trustee that the relationship established by the deposit of the funds of the City of Lincoln with said bankrupt was not that of trustee and beneficiary, but rather was that of debtor and creditor.

The sum for which priority was allowed by the District Court on review was the amount of the lowest balance in the general bank account of the bankrupt prior to the date of adjudication in bankruptcy.

Standard Accident Insurance Company is the real party in interest as claimant in that it paid to City of Lincoln the entire amount due it from the bankrupt and is now the assignee of said claim.

The specific contentions of the undersigned trustee appear more fully in the assignment of errors filed with said petition.

Respectfully submitted,

L. A. RICKETTS,
Trustee in Bankruptcy of
Lincoln Trust Company,
By R. A. Boehmer &
Perry W. Morton,
His Attorneys.

(Endorsed): No. 10,218. Petition for Appeal. Filed in U. S. Circuit Court of Appeals on Jan. 5, 1935. E. E. Koch, Clerk.

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114 (Assignment of Errors on Appeal of L. A. Ricketts, Trustee, Filed in U. S. Circuit Court of Appeals.)

United States Circuit Court of Appeals
Eighth Circuit.

In the Matter of

Lincoln Trust Company, Bankrupt.

Case No. 2314. In Bankruptcy.

In Re Claim of the City of Lincoln and Standard Accident Insurance Company.

Comes now L. A. Ricketts, Trustee in Bankruptcy, appellee in the above entitled cause, and files the following assignment of errors upon which he will rely in the prosecution of the appeal herewith petitioned for in said cause from the decree and judgment filed on December 17, 1934, in the District Court of the United States for the District of Nebraska, Lincoln Division:

1. The court erred in finding and holding that the claimant has, ever since the amendment to its claim was allowed, claimed that it was entitled to priority of a sovereign under the laws of Nebraska.

2. The court erred in finding and holding that the assets of the bankrupt which passed to the Trustee in Bankruptcy included $628.63 of the funds paid by said city to the Bankrupt.

3. The court erred in finding and holding that the Standard Accident Insurance Company became entitled to all the rights of said city under said amended claim.

4. The court erred in finding and holding that the sum of $45,000 paid by said city to the Lincoln Trust Company was to be held in trust for said city, and that it constituted a trust fund.

5. The court erred in modifying the order of the Referee and in allowing priority in the amount of $628.63 and in ordering said sum to be paid to said claimant prior to the claims of general creditors.

6. The court erred in not finding and holding that the funds deposited with said bankrupt did not constitute a trust fund.

114a 7. The court erred in not finding and holding that the said claimant was not entitled to any priority over other creditors.

Wherefore, appellee and cross-appellant prays that the judgment and decree filed in the District Court of the United States for the District of Nebraska, Lincoln Division, on December 17, 1934, be modified by denying any priority to the claim of said City of Lincoln and Standard Accident Insurance Company in any sum whatsoever, and that said claim be allowed as a general claim only, and for such other and further relief as to the court may seem just and proper.

Dated January 4, 1935.

L. A. RICKETTS,
Trustee of Lincoln Trust Company, Bankrupt.
By R. A. Behmer and
Perry W. Morton,
His Attorneys.

(Endorsed): No. 10,218. Assignment of Errors. Filed in U. S. Circuit Court of Appeals Jan. 5, 1935, E. E. Koch, Clerk.

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115 (Waiver of Notice of Hearing of Petition for Appeal of L. A. Ricketts, Trustee.)

Receipt is hereby acknowledged of a copy of petition for cross-appeal and assignment of errors to be filed in the above entitled court and relating to the decree filed in the District Court of United States for the District of Nebraska, Lincoln Division on December 17, 1934, and the undersigned hereby

waive notice of hearing on said petition and consent to the immediate hearing of said petition for cross-appeal.

Signed January 4, 1935.

CITY OF LINCOLN, NEBRASKA,
and
STANDARD ACCIDENT INSURANCE COMPANY,
By Don W. Stewart,
A. A. Whitworth,
Charles B. Paine, Their Attorneys.

(Endorsed): No. 10,218. Waiver of Notice. Filed in U. S. Circuit Court of Appeals on Jan. 5, 1935, E. E. Koch, Clerk.

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116 (Order of U. S. Circuit Court of Appeals Allowing Appeal to L. A. Ricketts, Trustee.)

United States Circuit Court of Appeals, Eighth Circuit.

November Term, 1934.

Tuesday, January 8, 1935.

L. A. Ricketts, Trustee in Bankruptcy of Lincoln Trust Company, Appellant,
No. 10218. vs.
City of Lincoln, Nebraska, and Standard Accident Insurance Company.

Appeal from the District Court of the United States for the District of Nebraska.

In the Matter of

Lincoln Trust Company, Bankrupt.

In this matter L. A. Ricketts, Trustee in Bankruptcy of the Lincoln Trust Company, has filed his petition for cross-appeal from the judgment and decree entered by the District Court of the United States for the District of Nebraska on December 17, 1934, and also his assignment of errors and a waiver by counsel for the City of Lincoln, Nebraska, and Standard Accident Insurance Company of the hearing on the said petition for cross-appeal, and said matters having been considered, It is now here ordered by this Court that the cross-appeal prayed for, be, and the same is hereby, allowed, the appellant to file with the Clerk of this Court on or before January 21st, 1935, a bond for costs in the sum of Two Hundred Fifty ($250.00) Dollars, with good and sufficient secu-

rity, said bond to be approved by this Court or one of the Judges thereof.

And it is further ordered that the transcript of the record to be filed on the appeal allowed by said District Court to the said City of Lincoln, Nebraska, and Standard Accident Insurance Company be treated and considered as a transcript of the record on the appeal hereby allowed and that briefs of the parties to be filed on the appeal allowed by said District Court be treated and considered as the briefs of the parties on this cross-appeal.

January 8, 1935.

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117 (Order of U. S. Circuit Court of Appeals that Trustee in Bankruptcy be Not Required to Give Cost Bond on Appeal.)

United States Circuit Court of Appeals, Eighth Circuit.

November Term, 1934.

Friday, January 11, 1935.

L. A. Ricketts, Trustee in Bankruptcy of Lincoln Trust Company, Appellant,

No. 10218. vs.

City of Lincoln, Nebraska, and Standard Accident Insurance Company.

Appeal from the District Court of the United States for the District of Nebraska.

In the Matter of

Lincoln Trust Company, Bankrupt.

By order of this Court of January 8, 1935, a cross-appeal was allowed to L. A. Ricketts, Trustee in Bankruptcy of Lincoln Trust Company, and there was inadvertently included in the order in this cause a provision that said Trustee file cost bond in the sum of Two Hunderd ($250.00) Dollars with the Clerk of this Court. As trustees in bankruptcy are not required by law to give bonds on appeal. It is now here ordered by this Court that such bond be not required of the trustee in his cause.

January 11, 1935.

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118 (Citation on Appeal Allowed to L. A. Ricketts, Trustee, by U. S. Circuit Court of Appeals.)

United States Circuit Court of Appeals, Eighth Circuit.

L. A. Ricketts, Trustee in Bankruptcy of Lincoln Trust Company, Appellant,

No. 10218.

vs.

City of Lincoln, Nebraska, and Standard Accident Insurance Company.

Appeal from the District Court of the United States for the District of Nebraska.

In the Matter of

Lincoln Trust Company, Bankrupt.

United States of America,

To City of Lincoln, Nebraska, and Standard Accident Insurance Company.

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, forty days from and after the date this citation bears date, pursuant to appeal allowed by said Court, wherein L. A. Ricketts, Trustee in Bankruptcy of Lincoln Trust Company, is Appellant and you are Appellee, to show cause, if any there be, why the judgment and decree of the District Court of the United States for the District of Nebraska, Lincoln Division, entered December 17, 1934, as in said appeal mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness the Honorable Kimbrough Stone, Senior United States Circuit Judge in and for the Eighth Circuit, this 8th day of January, A. D. 1935.

KIMBROUGH STONE,
Senior United States Circuit Judge in and for the Eighth Circuit.

Service of the foregoing citation on appeal accepted this 10th day of January, 1935.

DON W. STEWART,
A. A. WHITWORTH,
CHARLES B. PAINE,
Attorneys for City of Lincoln, Nebraska, and Standard Accident Insurance Company.

(Endorsed): No. 10,218. Citation on Appeal Allowed by U. S. Circuit Court of Appeals. Filed in U. S. Circuit Court of Appeals on Jan. 11, 1935. E. E. Koch, Clerk.

111 And thereafter the following proceedings were had in said causes in the Circuit Court of Appeals, viz.:

(Appearance of Counsel for Appellants in Cause No. 10213.)

United States Circuit Court of Appeals,
Eighth Circuit.

City of Lincoln, Nebraska, et al., Appellants,
No. 10,213. vs.
L. A. Ricketts, as Trustee, etc.

The Clerk will enter my appearance as Counsel for the Appellants.

DON W. STEWART,
A. A. WHITWORTH,
CHARLES B. PAINE,
1412 Sharp Bldg.,
Lincoln, Nebraska.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Jan. 5, 1935.

(Appearance of Counsel for Appellee in Cause No. 10213.)

The Clerk will enter my appearance as Counsel for the Appellee.

R. A. BOEHMER,
PERRY W. MORTON,
both of 126 So. 11th Str.,
Lincoln, Nebraska.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Jan. 16, 1935.

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112 (Appearance of Counsel for Appellant in Cause No. 10218.)

United States Circuit Court of Appeals,
Eighth Circuit.

L. A. Ricketts, as Trustee in Bankruptcy, etc., Appellant,
No. 10218 vs.
City of Lincoln, Nebraska, et al.

The Clerk will enter my appearance as Counsel for the Appellant.

R. A. BOEHMER,
PERRY W. MORTON,
both of 126 So. 11th Str.,
Lincoln, Nebraska.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Jan. 16, 1935.

(Appearance of Counsel for Appellees in Cause No. 10218.)

The Clerk will enter my appearance as Counsel for the Appellees.

DON W. STEWART,
A. A. WHITWORTH,
CHARLES B. PAINE,
1412 Sharp Bldg.,
Lincoln, Nebr.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Jan. 14, 1935.

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113 (Appearance of Counsel for Appellants in Cause No. 10219.)

United States Circuit Court of Appeals,
Eighth Circuit.

City of Lincoln, Nebraska, et al., Appellants,
No. 10219. vs.
L. A. Ricketts, as Trustee in Bankruptcy, etc.

The Clerk will enter my appearance as Counsel for the Appellants.

DON W. STEWART,
A. A. WHITWORTH,
CHARLES B. PAINE,
1412 Sharp Bldg.,
Lincoln, Nebr.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Jan. 14, 1935.

(Appearance of Counsel for Appellee in Cause No. 10219.)

The Clerk will enter my appearance as Counsel for the Appellee.

R. A. BOEHMER,
PERRY W. MORTON,
both of 126 So. 11th Str.,
Lincoln, Nebraska.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Jan. 16, 1935.

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114 (Appearance of Counsel for Appellant in Cause No. 10220.)

United States Circuit Court of Appeals,
Eighth Circuit.

L. A. Ricketts, as Trustee in Bankruptcy, etc., Appellant,
No. 10220. vs.
City of Lincoln, Nebraska, et al.

The Clerk will enter my appearance as Counsel for the Appellant.

R. A. BOEHMER,
PERRY W. MORTON,
both of 126 So. 11th Str.,
Lincoln, Nebraska.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Jan. 16, 1935.

(Appearance of Counsel for Appellees in Cause No. 10220.)

The Clerk will enter my appearance as Counsel for the Appellees.

DON W. STEWART,
A. A. WHITWORTH,
CHARLES B. PAINE,
1412 Sharp Bldg.,
Lincoln, Nebr.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Jan. 14, 1935.

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115 (Order of Submission.)

United States Circuit Court of Appeals,
Eighth Circuit.

March Term, 1935.

Thursday, March 21, 1935.

City of Lincoln, Nebraska, et al., Appellants,
No. 10213. vs.
L. A. Ricketts, as Trustee in Bankruptcy, etc.

Appeal from the District Court of the United States for the District of Nebraska.

L. A. Ricketts, Trustee in Bankruptcy, etc., Appellant,
No. 10218. vs.
City of Lincoln, Nebraska, et al.

Appeal from the District Court of the United States for the District of Nebraska.

City of Lincoln, Nebraska, et al., Appellants,
No. 10219. vs.
L. A. Ricketts, as Trustee in Bankruptcy, etc.

Appeal from the District Court of the United States for the District of Nebraska.

and

L. A. Ricketts, Trustee in Bankruptcy, etc., Appellant,
No. 10220. vs.
City of Lincoln, Nebraska, et al.

Appeal from the District Court of the United States for the District of Nebraska.

These causes, Nos. 10213, 10218, 10219 and 10220, having been called for hearing in their regular order, are argued together, and argument was commenced by Mr. Don W. Stewart for the City of Lincoln, et al., continued by Mr. Perry W. Morton and Mr. R. A. Boehmer for L. A. Ricketts,
116 Trustee, etc., and concluded by Mr. Don W. Stewart for the City of Lincoln, et al.

Thereupon, these causes were submitted to the Court on the transcript of the record from said District Court and the briefs of counsel filed herein.

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117 (Opinion.)

United States Circuit Court of Appeals,
Eighth Circuit.

No. 10,213.—MARCH TERM, A. D. 1935.

City of Lincoln, Nebraska, et al., Appellants, vs. L. A. Ricketts, as Trustee in Bankruptcy, etc., Appellee.	Appeal from the District Court of the United States for the District of Nebraska.

No. 10,218.—MARCH TERM, A. D. 1935.

L. A. Ricketts, Trustee in Bankruptcy, etc.
Appellant,
vs.
City of Lincoln, Nebraska, et al.,
Appellees.

Appeal from the District Court of the United States for the District of Nebraska.

No. 10,219.—March Term, A. D. 1935.

City of Lincoln, Nebraska, et al.,
Appellants,
vs.
L. A. Ricketts, as Trustee in Bankruptcy, etc.,
Appellee.

Appeal from the District Court of the United States for the District of Nebraska.

No. 10,220.—March Term, A. D. 1935.

L. A. Ricketts, Trustee in Bankruptcy, etc.,
Appellant,
vs.
City of Lincoln, Nebraska, et al.,
Appellees.

Appeal from the District Court of the United States for the District of Nebraska.

[April 27, 1935.]

Mr. Don W. Stewart (Mr. A. A. Whitworth, Mr. Charles B. Paine, and Messrs. Stewart, Stewart & Whitworth were with him on the brief), for City of Lincoln, et al.

Mr. Perry W. Morton and Mr. R. A. Boehmer for L. A. Ricketts, as Trustee in Bankruptcy, etc.

Before Gardner, Woodrough and Van Valkenburgh, Circuit Judges.

GARDNER, Circuit Judge, delivered the opinion of the Court.

There is involved in these appeals the right of the City of Lincoln, Nebraska, to a priority in the payment of its claim of $45,509.00 against the Lincoln Trust Company, bankrupt. The lower court allowed priority in the amount of $628.63, and denied priority as to the balance of the claim, but allowed it as a general claim. Both parties have appealed. There is no dispute as to the facts so far as they are disclosed by the record, though there may be some dispute as to what facts may properly be inferred from those establi-

The City of Lincoln, a municipal corporation, organized under special charter, on September 26, 1928, paid to the Lincoln Trust Company the sum of $45,000.00. The character of the business of the Lincoln Trust Company is not shown in any detail, but it is stipulated that at all times mentioned in the proceeding, and up to July 9, 1932, it was a corporation "organized and existing under the laws of the State of Nebraska and engaged in conducting a general trust company business." On receipt of these funds from the city treasurer, it delivered to the city treasurer nine certificates of $5,000.00 each, in substantially the following form:

"No. Lincoln, Nebraska, Sept. 26, 1928 No. ....

"THIS IS TO CERTIFY that the LINCOLN TRUST COMPANY of Lincoln, Nebraska, holds for investment in Trust, funds belonging to City Treasurer of Lincoln, Nebraska, in the sum of Five Thousand & no/100 Dollars ($5,000.00), with interest at 3 per cent per annum payable quarterly from date until returnable to owner on demand 19...

"This Trust Certificate bears no per cent interest after maturity.

LINCOLN TRUST COMPANY,
By (S.) Howard Hadley, Secretary."

The funds so received were placed in the general bank account of the Trust Company and were carried on the books of the Trust Company in its general ledger account and not on the books or accounts of the trust department. The entry in the general ledger account is as follows:

"Trust Certificate	City Treasurer of Lincoln	Credit	Balance
10-1-28	By 160-162 to 169 inclusive $5000.00 each at 3% on demand	45,000.00	45,000.00"

The Trust Company paid interest to the City at the rate of 3 per cent per annum up to March 26, 1932. On June 14, 1932, the City demanded payment of the principal and accrued interest on these certificates, the demand being refused, and on July 9, 1932, the Trust Company was adjudged a bankrupt. At the time these funds were paid to the Trust Company it, as principal, and the Standard Accident Insurance Company as surety, executed a bond to the City, by which it was agreed that this money should be repaid to the City upon its demand.

At the time the City paid the $45,000.00 to the Trust Company, it had no separate bank account for its trust department, but thereafter, on October 3, 1931, it created a trust department bank account, and at that time transferred to that account $49,679.17, a sum sufficient to take care of all its trust liabilities, except the amount due the City of Lincoln, which was not included in the account. Up to the time of the demand of payment the lowest balance in cash in the general bank account of the Trust Company was $7,875.97, and on that date the Trust Company had in addition certain so-called cash items amounting to $5,193.45. Following the City's demand, the Trust Company took from its general account $44,982.46, and transferred it to the trust department of the Trust Company, where it was set up as a new account designated "Segregated Assets." This fund was to cover certain items of principal payments, interest, and other payments that were received after April 7, 1932. At the time of adjudication in bankruptcy there was a balance in this segregated assets account of $25,097.09.

Out of its general bank account the Trust Company also received funds from various persons for which it issued receipts, and which accounts were known as "Modern Investments." These were in the nature of installment contracts for the purchase of real estate mortgage bonds, and at the time the City Treasurer paid the Trust Company the funds here in controversy, the money in all the Trust Company's accounts was carried in the general bank account of the Company.

The appellant Standard Accident Insurance Company, pursuant to the terms of its bond, paid the City the amount of its claim, whereupon the claim was assigned to the Insurance Company. The City first filed a general claim against the bankrupt, which was duly allowed. Subsequently, on leave granted, the City filed an amended claim, seeking priority of payment over general creditors. The referee denied the right of priority asserted by the City, and on review the lower court modified the order of the referee by allowing priority in the amount of $628.63.

It is here urged (1) that a trust was created by an agreement of the parties; and (2) that the City has the right of a sovereign to priority in payment. Other questions are urged, but in the view we have taken on these issues, they are not material to a determination of the case.

As has been observed, the referee was of the view that no trust relation was created by the contract of the parties. The lower court expressed very grave doubts on this question, but concluded that as there was nothing in the record to indicate the trust nature of the transaction, except the contract itself, and the fact that interest was paid, and the fact that the Trust Company felt perfectly free to use the money in any manner it saw fit, the issue should be resolved in favor of the existence of the trust relation. The City is asserting this trust relation and its consequent right of priority, and the burden was upon it to prove facts giving rise to such a relation. Whether or not the payment of these funds to the Trust Company gave rise to a trust relation depends upon the mutual understanding and intention of the parties at the time of the payment. *Northern Sugar Corp.* v. *Thompson,* (CCA8) 13 Fed. (2d) 829; *Keyes* v. *Paducah & I. R. Co.,* (CCA6) 61 Fed. (2d) 611.

The instrument upon which the Insurance Company relies is very meager and ambiguous. It certifies that the Trust Company holds for investment in trust funds belonging to the City Treasurer. Neither the instrument nor any acts of the parties, nor other testimony, indicates what, if any, investments were in contemplation, when, if at all, such investments were to be made, nor on whose behalf they were to be made. Apparently, it was in contemplation of the parties that the money should become the funds of the Trust Company because the Trust Company not only agreed to pay interest on these funds, but it in fact did pay interest thereon for some four and a half years, and no investment was ever ma e. Again, the funds were not kept separate, but went into the g n l bank account of the Trust Company with other general funds. In ad-

dition to this, it is significant that the Trust Company gave bond, not for the faithful discharge of any duty it may have assumed as trustee in the investment of these funds, but for the payment of the funds to the City upon the City's demand, and the surety on the bond, now the beneficial owner of the claim, paid the amount of money due the city, together with interest.

Interest is the compensation allowed by law, or fixed by the parties, for the use or forbearance of money. *Redfield* v. *Ystalyfera Iron Co.*, 110 U. S. 174; *Loudon* v. *Shelby County Taxing Dist.*, 104 U. S. 771; *Maryland Cas. Co.* v. *Omaha Elec. Light & Power Co.*, (CCA8) 157 Fed. 514; *Davey* v. *First Natl. Bank of Deadwood* (S. D.), 72 N. W. 83. The provision for the payment of interest is inconsistent with the thought that the title to this money remained with the City. Certainly, the provision for the payment of interest implied that the Trust Company had the right to use it for its own benefit, and apparently the parties so understood and so treated the transaction. Without any objection or protest on behalf of the City, the funds were turned into the general bank account of the Trust Company, and so far as appears from the record, no instructions were ever given the Trust Company, and no inquiry made by the City, with reference to these funds for four and a half years, during all of which time the City collected its semi-annual interest from the Trust Company.

It is possible that the City may have had two purposes in view in paying this money to the Trust Company. One was a possible future investment, and the other was the securing of interest from the funds. The last purpose is definitely indicated not only by the contract but by all the subsequent acts of the parties, and the second purpose was inconsistent with the first. Had the first purpose in fact been carried out, and some investment actually made on behalf of the City, the property invested in would thereby be segregated and set apart and held in trust for the City. The funds, with the knowledge and consent of the City, were not handled as trust funds, and if the parties originally intended creating a trust relation, that purpose was manifestly subsequently abandoned. *City Council of Charleston* v. *Elliott*, (CCA4) 73 Fed. (2d) 920; *Keyes* v. *Paducah & I. R. Co.*, (CCA6) 61 Fed. (2d) 611; *Northern Sugar Corp.* v. *Thompson*, (CCA8) 13 Fed. (2d) 829; *Santee Timber Corp.* v. *Elliott*, (CCA4) 70 Fed. (2d) 179; *McNulta* v. *West Chicago Park Com'rs*, (CCA7) 99 Fed. 900; *Swan* v. *Children's Home Society*, (CCA4) 67 Fed. (2d) 84; *State* v. *Bartley* (Neb.), 58 N. W. 172; *Board* v. *Union Trust Co.* (Mich.), 99 N. W. 373; *City of Aberdeen* v. *Natl. Surety Co.* (Wash.), 275 Pac. 62;

Lewis v. *Dark Tobacco Growers' Coop. Assn.* (Ky.), 57 S. W. (2d) 8.

In *City Council of Charleston* v. *Elliott, supra,* the City asserted right of priority for deposits made by it to meet tax anticipation notes executed by the City. The claim of the City was that the deposits were trust funds in the hands of the bank. After reciting that the deposits were made under an agreement that tax collections would be deposited in special accounts separate from the general deposit account of the City and that the tax anticipation notes of each tax year would be paid from the account in which the taxes for that year had been deposited, it is said:

"The funds so deposited were mingled by the bank with its general assets; and there is nothing to show that it was contemplated by any one that they should be segregated from the general funds of the bank or that the bank should handle them as trust funds held by it as a fiduciary. On the contrary, it appears that the bank paid interest on the deposit balances in the tax accounts. It is true that in December, 1931, there was talk of withdrawing a part of the funds from the bank in order that a division of deposits might be made among other banks of the city and that at that time the bank opposed the withdrawals on the ground that the deposits were trust funds, as well as on the ground that their withdrawal would ruin the bank; but not even then was there any suggestion that the funds deposited by the city were being segregated from the other funds of the bank or were being handled otherwise than as funds received under general deposits. * * *

"The principal argument made in behalf of the city is that the conversations in December show that the deposits in question were trust funds and that they should be so treated by the court, irrespective of such incidental matters as the handling of the funds and the payment of interest thereon. We think, however, that greater weight should be given to the manner in which the deposits were made, to the way in which they were handled by the bank without objection from the city, and to the fact that interest was paid upon them, than to mere language used in describing them, if this language were inconsistent with the nature of the transactions as shown by what the parties did, for it is axiomatic that equity regards substance and not form."

In the absence of any writing clearly indicating the intention of the parties, in attempting to determine that intention we are inclined to give more heed to what was done by the parties than to what was said by them.

Even though the money was paid with the thought of a possible future investment, this special purpose does not in itself give rise to a trust relation. *Blakey* v. *Brinson,* 286 U. S. 254; *Mark* v. *Westlin* (D. C.), 48 Fed. (2d) 609; *Kershaw* v. *Kimble,* (CCA10) 65 Fed. (2d) 553; *Northern Sugar Corp.* v. *Thompson,* (CCA8) 13 Fed. (2d) 829.

What is said by the Supreme Court of Nebraska in *State* v. *Bartley, supra,* seems here apposite. It is there said:

"Who ever heard of that kind of a deposit of money being paid out on checks, or of a banking institution paying for the privilege of holding a special deposit of funds? The identical moneys deposited are not required to be returned. Obviously, the bank receiving them had the right to use and control the money as its own. It could loan the funds for the purpose of earning the money with which to pay the stipulated interest due the state."

In *Board* v. *Union Trust Co., supra,* it is said:

"It would be doing violence to all experience to say that it was intended that the bank should keep this fund intact as a special deposit, and at the same time pay interest thereon to the depositor."

In *Swan* v. *Children's Home Society, supra,* quoting from *Scammon* v. *Kimball,* 92 U. S. 362, it is said:

" 'Where the agreement is to pay interest, the agreement is obligatory; but the fact that the depositary agreed to pay interest affords very strong evidence that the title to the money deposited passed out of the depositor by the act of making the deposit.' "

In the recent case of *Lewis* v. *Dark Tobacco Growers' Coop. Assn., supra,* it is said:

"It is a matter of common knowledge that interest is paid on money for the use of it. Webster's Unabridged Dictionary defines the word 'interest' as follows: 'A rate per cent of money paid for the use of money or the forbearance of demanding payment of a debt.' "

We conclude that the instrument relied upon, in view of the contemporaneous and subsequent acts of the parties thereto, and viewed in the light of the surrounding facts and circumstances, did not create a trust relation between the City and the Trust Company. But it is urged by appellant Insurance Company that if the money was paid to the Trust Company as a deposit then it became a trustee *ex maleficio* because it had no right to accept depos-

its. The Trust Company in this transaction was not in the banking sense of the word receiving deposits; but we are of the view that the transaction resulted in the creation of the relation of debtor and creditor. The Trust Company did have the power to borrow money, and this it did, paying interest for the use thereof, and giving a bond in the nature of security. The City has received the benefit of the transaction, having accepted from time to time the interest, and knowingly participated therein. It is hardly in position to come into a court of equity repudiating or casting aspersions upon the transaction. It must come into court with clean hands.

It is earnestly urged that by right of sovereignty, the City is entitled to priority in the payment of its claim. At common law, the Crown had a priority over all subjects for the payment of debts due it. In a receivership case arising in a state where the common law prevailed without statutory modification, and where the Supreme Court of the State had not theretofore passed upon the question, we held that such prerogative right inhered in a city as an agency of the state exercising a delegated sovereignty. *City and County of Denver* v. *Stenger*, (CCA8) 295 Fed. 809.

In *Fiman* v. *State of South Dakota*, (CCA8) 29 Fed. (2d) 776, we held the rule not applicable to a settlement in the distribution of the assets of a national bank because the National Bank Act, providing for a ratable distribution of the assets of an insolvent national bank, constitutes a complete code of laws covering the dissolution of national banks and the manner of payment of their debts.

The question of the right of priority in payment of claims against a bankrupt estate is covered by Section 64-b of the Bankruptcy Act, which, so far as here pertinent, provides as follows:

"The debts to have priority in advance of the payment of dividends to creditors and to be paid in full out of the bankrupt estates and the order of payment shall be * * * (7) debts owing to any person who by the laws of the States or the United States is entitled to priority; Provided, That the term 'person' as used in this section shall include corporations, the United States, and the several States and Territories of the United States."

It is contended that this section of the Bankruptcy Act preserves the City's right as a sovereign to priority in payment of its debt in the provision that "debts owing to any person who by the laws of the States or the United States is entitled to priority." It is observed that the statute defines the scope to be given to the term "person", it being provided that it shall include "corporations,

the United States, and the several States and Territories of the United States." It makes no mention of municipalities, counties, or other subdivisions of the Government, and hence, we think they are necessarily excluded.

In *Davis* v. *Pringle*, 268 U. S. 315, the court considered a contention that the United States had a right to priority in payment of claims arising out of the federal control of railroads. The matter arose in connection with claims against a bankrupt estate. As Section 64-b then stood, it did not specifically name the United States. In the course of the opinion by Justice Holmes it is, among other things, said:

"It may be assumed that the priority must be found if at all in the Bankruptcy Act and in its supposed incorporation of Rev. Stats. Sec. 3466. That Act, as was said in *Guarantee Title & Trust Co.* v. *Title Guaranty & Surety Co.*, 224 U. S. 152, 160, 'takes into consideration * * * the whole range of indebtedness of the bankrupt, national, state and individual, and assigns the order of payment.' It was passed with the United States in the mind of Congress as is shown by the exception of debts due as taxes levied by the United States from the discharge in Sec. 17-a(1), the limitation on debts owing to the United States as a penalty in Sec. 57-j. and the provisions as to priority in Sec. 64 with which we are principally concerned. By 'a' of that section 'The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States * * * in advance of the payment of dividends to creditors.' This taken by itself would seem to exclude other debts. But the section goes on in 'b' to give priority in the order named to '(5) debts owing to any person who by the laws of the States or the United States is entitled to priority,' and the Government argues that by Sec. 1(19) 'persons' shall include corporations and that the United States is a corporation and therefore within these words. Being within them, it is said, it is entitled to priority by a law of the United States, the well known Rev. Stat. Sec. 3466. It is said that no other person except the United States itself can be discovered who is given the right by its laws."

The court held that to extend the definition of "persons" to include the United States would be inconsistent with the context, and denied the claim of priority, even though by specific general statute the right of priority was given.

If, in the instant case, it be conceded that the City as a sovereign had the prerogative right of priority of payment of its

claims, yet in so far as such claims are urged against a bankrupt estate, the priority will not be recognized unless within the provisions of the bankruptcy law which specifically provides for a priority.

In *Fiman* v. *State of South Dakota, supra,* we said:

"The National Bank Act (12 USCA Secs. 21-200) provides for a ratable distribution of the assets of an insolvent national bank, constitutes a complete code of laws for the organization, control, and dissolution of national banks and the manner of payment of their debts, and even a federal statute, general in nature, providing for prior payments of debts due the United States is not effective as against its provisions."

The asserted right of priority of payment is not a lien that attached to the property any more than the right of the United States to priority given it by Revised Statutes, Sec. 3466, considered by the Supreme Court in *Davis* v. *Pringle, supra,* is such a lien, and the right of priority in payment of claims against a bankrupt estate, other than those based upon specific liens, must be found in the Bankruptcy Act.

We conclude that there was no right to priority of payment of the City's claim, and the judgment appealed from is therefore modified to the extent of disallowing any part of the City's claim as a prior claim, and as so modified the judgment appealed from is

Affirmed.

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128 (Decree in Causes Nos. 10213, 10218, 10219 and 10220.)

United States Circuit Court of Appeals,
Eighth Circuit.

March Term, 1935.

Monday, April 29, 1935.

City of Lincoln, Nebraska, and Standard Accident Insurance Company, Appellants,
No. 10,213. vs.
L. A. Ricketts, as Trustee in Bankruptcy of Lincoln Trust Company, Bankrupt.

Appeal from the District Court of the United States for the District of Nebraska.

L. A. Ricketts, Trustee in Bankruptcy of Lincoln Trust Company, Appellant,
No. 10,218. vs.
City of Lincoln, Nebraska, and Standard Accident Insurance Company.

Appeal from the District Court of the United States for the District of Nebraska.

City of Lincoln, Nebraska, and Standard Accident Insurance Company, Appellants,
No. 10,219. vs.
L. A. Ricketts, as Trustee in Bankruptcy of Lincoln Trust Company, Bankrupt.

Appeal from the District Court of the United States for the District of Nebraska.

and

L. A. Ricketts, Trustee in Bankruptcy of Lincoln Trust Company, Appellant.
No. 10,220. vs.
City of Lincoln, Nebraska, and Standard Accident Insurance Company.

Appeal from the District Court of the United States for the District of Nebraska.

129 These Causes came on to be heard on the transcript of the record from the District Court of the United States for the District of Nebraska, and were argued by counsel.

On Consideration Whereof, it is now here ordered, adjudged, and decreed by this Court, that the order of the said District Court appealed from in these causes be, and the same is hereby, modified to the extent of disallowing any part of the City's claim as a prior claim and as so modified the said order is affirmed with costs against the City of Lincoln, Nebraska, and Standard Accident Insurance Company.

It is further ordered by this Court that L. A. Ricketts as Trustee in Bankruptcy of Lincoln Trust Company, Bankrupt, have and recover against the City of Lincoln and Standard Accident Insurance Company the sum of ..... Dollars for his costs in this behalf expended and have execution therefor.

April 29, 1935.

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130 In the United States Circuit Court of Appeals, Eighth Circuit.

City of Lincoln, Nebraska, and Standard Accident Insurance Company, Appellants,
Numbers 10,213 and 10,219. vs. In Bankruptcy.
L. A. Ricketts, as Trustee in Bankruptcy of Lincoln Trust Company, Bankrupt, Appellee.

Appeal from the District Court of the United States for the District of Nebraska, Lincoln Division. Hon. J. A. Donohoe, District Judge.

Petition of Appellants for Rehearing.

Don W. Stewart,
A. A. Whitworth,
Charles B. Paine,
Stewart, Stewart & Whitworth,
Attorneys for Appellants,
1412 Sharp Building,
Lincoln, Nebraska.

Petition of Appellants for Rehearing.

Come now the appellants and petition the court to grant a rehearing for the reason material matters of law and
131 fact have been inadvertently overlooked by the court in the following particulars:

1. The court has inadvertently misconstrued the Bankruptcy Act in denying a municipal corporation the same right of priority as is given any other corporation and in citing Davis vs. Pringle, 268 U. S. 315, as authority for its finding, inadvertently overlooked the fact that Section 64B (7) of the Bankruptcy Act was amended for the purpose of repudiating the interpretation placed upon it by such case and has failed to properly apply the principle announced by the Supreme Court in such case.

2. The court has inadvertently placed an erroneous construction on the evidence in holding that no trust relation existed by agreement of the parties.

3. The court in assigning as a reason for the non-existence of a trust ex maleficio, the fact that the transactions between the City of Lincoln and the Lincoln Trust Company constituted a loan, inadvertently overlooked the fact that it is universally held that a loan of public funds for private purposes is illegal, and consequently regardless of what interpretation is placed upon the transaction, it must follow that either an expressed trust or a trust ex maleficio was created.

Wherefore, appellants respectfully pray the court to grant this petition for rehearing.

Respectfully Submitted,

CITY OF LINCOLN, NEBRASKA, and STANDARD ACCIDENT INSURANCE COMPANY, Appellants,
By Don W. Stewart,
A. A. Whitworth,
Charles B. Paine,
Attorneys for Appellants.

132 Certificate of Counsel.

The undersigned counsel for appellants in the above entitled appeal does hereby certify that he believes the foregoing petition for rehearing is well founded in law; that it presents material matters of law and fact inadvertently overlooked by the court as shown in its opinion, and that said petition is not filed for vexation or delay, but is presented in good faith and for the reasons stated therein.

DON W. STEWART.

(Endorsed): Filed in U. S. Circuit Court of Appeals, May 25, 1935.

(Order Denying Petition for Rehearing in Causes Nos. 10213 and 10219.)

May Term, 1935.

Wednesday, July 3, 1935.

The petition for a rehearing filed by counsel for the appellants in these causes having been considered, It is now here ordered by this Court that said petition for rehearing, be, and the same is hereby, denied.

July 3, 1935.

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133 (Motion to Stay Issuance of Mandate in Causes Nos. 10213, 10218, 10219 and 10220.)

In the United States Circuit Court of Appeals, Eighth Circuit.

In Bankruptcy.

Nos. 10213, 10218, 10219 and 10220.

City of Lincoln, Nebraska, and Standard Accident Insurance Company, Appellants & Cross-Appellees,

vs.

L. A. Ricketts, as Trustee in Bankruptcy of Lincoln Trust Company, Bankrupt, Appellee & Cross-Appellant.

Come now City of Lincoln, Nebraska, and Standard Accident Insurance Company, Appellants and Cross-Appellees in the above entitled matter, and show to the court that they intend to file an application to the Supreme Court of United States for certiorari as soon as a petition, record and briefs can be completed and within the time provided by law.

Wherefore, they pray that the mandate of this court be stayed and withheld for thirty days from the date on which mandate would otherwise be issued.

Dated this 11th day of July, 1935.

DON W. STEWART,
A. A. WHITWORTH,
C. B. PAINE,
STEWART, STEWART & WHITWORTH,
Attorneys for Appellants and Cross-Appellees.

134 The undersigned counsel for the above named appellants and cross-appellees in the above entitled action does hereby certify that the foregoing motion is not filed for the purpose of delay but is presented in good faith and for the reasons therein stated.

DON W. STEWART.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Jul. 12, 1935.

(Order Staying Issuance of Mandate in Causes Nos. 10213, 10218, 10219 and 10220.)

May Term, 1935.

Monday, July 15, 1935.

On Consideration of the motion of the City of Lincoln, Nebraska, et al., for a stay of the mandate in these causes pending a petition to the Supreme Court of the United States for a writ of certiorari, It is now here ordered by this Court that the issuance of the mandate herein, be, and the same is hereby, stayed for a period of thirty days from and after this date, and if within said period of thirty days there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed, the stay hereby granted shall continue until the final disposition of the cases by the Supreme Court.

July 15, 1935.

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135 (Clerk's Certificate.)

United States Circuit Court of Appeals,
Eighth Circuit.

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the District of Nebraska as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, and full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals, except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States in certain causes in said Circuit Court of Appeals wherein the City of Lincoln, Nebraska, et al., were Appellants and L. A. Ricketts, as Trustee in Bankruptcy of Lincoln Trust Company, Bankrupt, was Appellee, No. 10213, and wherein L. A. Ricketts, Trustee in Bankruptcy of Lincoln Trust Company, was Appellant and City of Lincoln, Nebraska, et al., were Appellees, No. 10218, and wherein the City of Lincoln, Nebraska, et al., were Appellants and L. A. Ricketts, as Trustee in Bankruptcy of Lincoln Trust Company, Bankrupt, was Appellee, No. 10219, and wherein L. A. Ricketts, Trustee in Bankruptcy of Lincoln Trust Company, was Appellant and City of Lincoln, Nebraska, et al., were Appellees, No. 10220, as full, true and complete as the originals of the same remain on file and of record in my office.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this seventeenth day of July, A. D. 1935.

(Seal)

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 14, 1935

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted, limited to the question of the application of sec. 64b of the Bankruptcy Act.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied [illegible]tition shall be treated as though filed in response to